No. 7765

United States

Circuit Court of Appeals

For the Ninth Circuit.

MARGARET B. BARRINGER and PHOENIX TITLE and TRUST COMPANY, as Trustee,
Appellant,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, CENTRAL ARIZONA LIGHT and POWER COMPANY, a corporation, COUNTY OF MARICOPA, a political subdivision of the State of Arizona, STATE OF ARIZONA, JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona, MITT SIMS, Treasurer of the State of Arizona, W. R. WELLS, RAYMOND L. NIER, J. ALLEN WELLS, E. L. GROSE and MAUDE M. GROSE, his wife, GLEN E. WEAVER, LUCILLE NICHOLS, NELLIE B. WILKINSON, SUSIE M. WALLACE, E. R. FOUTZ, THOMAS J. TUNNEY, and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,
Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 433 to 841

Upon Appeal from the District Court of the United States for the District of Arizona.

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(Testimony of L. J. Taylor.)

ONLY, however, after and in event of failure or refusal on the part of said Beneficiary to commence, and/or to prosecute with due diligence, and/or to complete, the installation thereof within the time or times hereinbefore fixed—as said Trustee, or said Payee with the consent and approval of said Trustee, shall elect; and, to that end, may advance such moneys as said Trustee, or said Payee with the approval of said Trustee, may deem necessary therefor;

AND EACH and every sum so advanced shall be a first lien upon, and be secured by, the entire beneficial interest under this Trust PRIOR AND SUPERIOR TO THE DEBT HEREINBEFORE DESCRIBED IN FAVOR OF THE PAYEE HEREUNDER; each such advance- [658] ment to be an obligation of the Beneficiary hereunder and to be repaid by said Beneficiary on or before thirty (30) days from date of such advancement; together with interest thereon from date of advancement until repaid at the rate of eight per cent (8%) per annum, payable quarterly; however, neither said Trustee nor the Payee hereunder shall be under any obligation whatsoever to perform any act or make any payment or advancement hereinbefore mentioned;

NOW, THEREFORE, said PHOENIX TITLE AND TRUST COMPANY, Trustee hereunder as aforesaid hereby CERTIFIES AND DECLARES:

A. That the sole beneficial interest under this Trust is vested in THOMAS J. TUNNEY, a bache-

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lor hereby designated the 'Beneficiary' under this Trust,

B. And that it holds and will hold the title to the hereinbefore described real property IN TRUST under the terms and conditions set forth in this Declaration, and for the following uses and purposes, namely:

SECTION ONE.

TO SECURE, in the manner hereinafter provided, the following:

(a) The payment of the debt hereinbefore described owing to said Payee;

(b) The payment of all other sums in this Declaration provided to be paid by said Beneficiary;

(c) And the performance of each and every act herein provided to be performed by said Beneficiary.

[659]

SECTION TWO.

TO RECEIVE PAYMENTS for, deed and convey the real property covered hereby in lots or parcels upon such terms, and for such prices, as said Trustee may be instructed, in writing, so to do by said Beneficiary;

PROVIDED the said prices thereof shall be not less than those hereafter to be agreed upon by said Trustee and the Beneficiary hereunder, and indicated on Schedule or Schedules of Sales Prices, to be marked 'Exhibit A', 'Exhibit A-1', 'Exhibit A-2', etc. consecutively, as the case may be, and to be

(Testimony of L. J. Taylor.)

attached hereto and then to be a part hereof, the same as though attached hereto at the signing of this Instrument; provided further that said sale prices shall aggregate a sum not less than Two Hundred Fifty Thousand Dollars ($250,000.00).

PROVIDED, ALSO, the minimum terms of each aforesaid sale shall be as follows: (a) Not less than 20% of the sales price in cash at the time of entering into a Sales Agreement. (b) The balance of such sales price to be paid in monthly, quarterly, semi-annual or annual payments.

SECTION THREE.

IT IS UNDERSTOOD and agreed that special Deeds and Sales Agreements containing such conditions, terms and restrictions as pertain to the lots to be conveyed shall be printed, and that the cost thereof shall be borne by the beneficiary.

SECTION FOUR.

DISTRIBUTION of the proceeds (principal and interest), received by the Trustee, arising from each hereinbefore mentioned sale of real property shall be made by said Trustee as follows: [660]

(1st) The first twenty per cent (20%) thereof shall be disbursed as follows:

(a) 20% thereof to the Payee to apply

(1) To the payment of interest on the unpaid portion of the indebtedness hereinbefore

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described to the next succeeding quarterly interest paying date.

(2) To the accumulation for, and payment hereunder to the Payee of, the release price hereinbefore mentioned of the property covered by said sales; each such release price to be applied—as hereinbefore provided—on the principal of said debt in favor of said Payee, and such applications to continue until such debt shall have been fully paid.

(b) 80% thereof shall be disbursed as follows:

(1) To the payment of the costs, fees, charges and advances (if any) hereunder of said Trustee;

(2) To the payment of taxes and assessments, levied and assessed against said property (including assessments of Salt River Valley Water Users' Association, if any) said Trustee, however, not to be liable for non-payment of any of such taxes or assessments in event said Trustee deems moneys hereunder not properly available therefor;

(3) And the remainder, if any, of the proceeds received from said sale shall be disbursed to the Beneficiary hereunder.

(2nd) All further sums over and above the first twenty per cent (20%) shall be disbursed as follows:

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(a) 50% thereof to the Payee to apply

(1) To the payment of interest on the unpaid portion of the indebtedness hereinbefore described to the next succeeding quarterly interest paying date.

(2) To the accumulation for, and payment hereunder to the Payee of, the release price hereinbefore mentioned of the property covered by said sales; each such release price to be applied—as hereinbefore provided—on the principal of said debt in favor of said Payee, and such applications to continue until such debt shall have been fully paid.

(3) To a further reduction of the indebtedness hereinbefore described (notwithstanding the payment of the release price of the property covered by said sale) and to be applied upon principal or inter- [661] est of such debt, interest on the amounts applied upon principal, however, not to cease until the quarterly interest paying date next succeeding its application by the Trustee.

(b) The remaining 50% thereof shall be disbursed as follows:

(1) To the payment of the costs, fees, charges, expenses and advances (if any) hereunder of said Trustee;

(2) To the payment of taxes and assessments, levied and assessed against said property (including assessments of Salt River Val-

(Testimony of L. J. Taylor.)

ley Water Users' Association, if any); said Trustee, however, not to be liable for non-payment of any of such taxes or assessments in event said Trustee deems moneys hereunder not properly available therefor.

(3) At the sole discretion of said Trustee to the accumulation of an Improvement Fund under this Trust, and hereinafter mentioned, for distribution therefrom, unless said Trustee shall have received evidence—satisfactory to it—of the payment in full of all costs and expenses incident to the aforesaid re-subdivision and improvement of the property covered hereby;

(4) Or provided the Trustee shall have been furnished with evidence (satisfactory to it as aforesaid) of the payment in full of said costs and expenses of re-subdivision and improvement, all of said surplus of proceeds of sale shall be paid to the Beneficiary under this Trust.

SECTION FIVE.

ALL MONEYS arising under paragraph designated '(3)' of (b) of distribution '2nd' of foregoing 'SECTION FOUR' of this Instrument, together with the $30,000.00 deposited with the Trustee and hereinbefore mentioned, shall constitute and maintain the IMPROVEMENT FUND under this Trust; and

DISTRIBUTION, at any time and from time to time, of the moneys in said Improvement Fund

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shall be made by said Trustee as follows:

1st: To the payment of the costs, fees, expenses, damages, and advances (if any) with interest, hereunder of said Trustee and Payee. [662]

2nd: To the payment of such bills and vouchers, for the resubdivision and/or improvement aforesaid of property covered hereby, as shall have been presented therefor to said Trustee; provided, however, the same first shall have been O. K.'d by said Beneficiary, excepting that, in event of refusal or failure so to O. K. any such bill or voucher, said Trustee —in its uncontrolled discretion—may pay the same (without any such O. K.) from moneys available therefor under the provisions of this distribution '2nd', and/or from the aforesaid $30,000.00 deposited with the Trustee.

3rd: AND, provided that when said Trustee shall have received evidence satisfactory to it of the payment in full of all costs and expenses of the aforesaid re-subdivision and improvement of the trust property, the surplus—if any—in said Improvement Fund shall be paid by said Trustee to the Beneficiary under this Trust.

SECTION SIX.

NO SALE or transfer of any beneficial interest of the Beneficiary or any assignee hereunder shall be valid or be binding on said Trustee until an executed original of the assignment, or other instru-

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ment evidencing such sale or transfer, has been filed with said Trustee and the Trustee's assignment fees paid therefor, excepting only, where such interest may pass or be transferred by decree or order of court and then only upon satisfactory proof of the regularity and validity of the proceedings in such matter being presented to said Trustee and the fees if the Trustee's attorney for passing thereon having been paid.

SECTION SEVEN.

IF THE PROPERTY covered hereby, or any portion [663] thereof, or the proceeds or avails therefrom, becomes liable for the payment of any inheritance, income or other tax, said Trustee is authorized to withhold and pay such tax out of any moneys in its possession for the account of the persons whose interest hereunder are so liable, unless such tax shall have been paid by such persons or someone else in their behalf.

Prior to final distribution of funds to the Payee and/or Beneficiary and prior to termination of this Trust, the Payee and/or Beneficiary shall furnish the Trustee with a showing satisfactory to it that all income, inheritance or other tax payable on the proceeds going to such Payee and/or Beneficiary have been fully paid, and shall furnish the Trustee with indemnity satisfactory to it to protect the Trustee against any claim made by a proper and lawful taxing authority on account of any income,

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inheritance or other tax payable upon such proceeds.

SECTION EIGHT.

UPON PAYMENT in full of all sums secured under this Trust in favor of said Payee, all interest in and to this Trust of said Payee thereupon shall immediately cease and terminate.

SECTION NINE.

NOTHING herein contained shall be construed as extending the time for the payment of any principal or interest of the debt secured hereby beyond the time therefor in the Promissory Note hereinbefore set out evidencing said debt.

SECTION TEN.

IF DEFAULT be made in the payment of principal or interest of the debt secured hereby, or in the payment of principal or interest of any other sum properly payable under this Trust by the Beneficiary hereunder, or upon breach by said Beneficiary of any other covenant, condition or stipulation [664] hereof, then the party or parties (i. e. Payee, Payees, or Trustee, as the case may be) as to whom such default or breach shall have been made may declare all sums secured hereby immediately due and payable, together with interest thereon at the rate of ten per cent (10%) per annum, and may collect same in a suit at law, or by foreclosure hereunder in the same manner as mortgages are fore-

(Testimony of L. J. Taylor.)

closed; and in case complaint is filed for a foreclosure of this Instrument as a mortgage, the Payee shall be entitled to the appointment of a Receiver, without bond, to take possession of the premises not theretofore released from the lien of the Payee, and collect the rents and profits thereof and to manage, control and handle the said property pending foreclosure proceedings and up to the time of redemption or issuance of sheriff's deed; and in case of such foreclosure the Beneficiary will pay to the party as to whom such default or breach shall have been made, in addition to the taxable costs of the foreclosure suit, five per cent (5%) as attorney's fees on the amount found due, which shall be a lien on said premises; and in case of settlement after suit is brought, but before trial, the Beneficiary agrees to pay one-half of the above attorney's fees.

SECTION ELEVEN.

ALL DEEDS and Sales Agreements affecting property covered hereby shall be executed solely by the Phoenix Title and Trust Company, Trustee; it being understood and agreed, however, that the Trustee shall not be obligated to warrant title except as against the acts of the Trustee.

IN EXECUTING Deeds and Sales Agreements the Trustee shall provide that the property is subject to all assessments of the Salt River Valley Water Users' Association not [665] delinquent at

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the date thereof, and in the event that any increased charges are made by said Salt River Valley Water Users' Association on account of the subdivision of said property or on account of the sale of any part thereof, called by said Association 'pick ups', the Trustee is hereby authorized and instructed to pay such charges, deducting sufficient money therefor from amounts otherwise payable to the Beneficiary.

THE TRUSTEE is further authorized, but not obligated, to pay all assessments of the Salt River Valley Water Users' Association on all unsold property, charging the same to any funds in its hands payable to the Beneficiary.

SECTION TWELVE

ALL MONEYS payable by purchasers of property under this Trust and all moneys arising or accruing from any and all sources under this Trust shall be paid to said Trustee to be thereafter disbursed by said Trustee as hereinbefore provided; and

DISBURSEMENTS hereunder may be made by checks of said Trustee.

SECTION THIRTEEN

IT IS DISTINCTLY UNDERSTOOD that the interest of the Beneficiary under this Trust is personal property, and that such Beneficiary has not and shall not have at any time any right, title or interest in or to any property covered hereby, and

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has not and shall not have any right or power to apply for or secure the dissolution or termination of this Trust or the partition or division of any of the trust property in any manner, except as otherwise provided in this Declaration; the sole right and power of the Beneficiary hereunder being to enforce [666] the performance of the terms of this Trust as expressly set forth herein.

SECTION FOURTEEN

AN OWNER'S POLICY of Title Insurance shall be issued by the Trustee with each Deed to lots or parcels purchased hereunder, insuring the purchaser in the full amount of the sales price of the land conveyed and showing title vested in the Trustee provided that the title risk be then accepted by said Phoenix Title and Trust Company; such policy to be subject to the regular printed exceptions contained therein, and to any liens or encumbrances affecting said property imposed by any act of the purchasers or any person deriving an interest in said property by or through said purchasers; the charge for said policy and all fees and charges in connection with such sale to be withheld by the Trustee from the purchase price prior to remitting the proceeds of each sale.

If it be desired to show the title to such property vested in any such purchaser, the Phoenix Title and Trust Company shall be entitled to receive $2.50 in addition to the price for such policy as set forth in 'Section Fifteen' hereof.

(Testimony of L. J. Taylor.)

SECTION FIFTEEN

THE TRUSTEE shall receive for its services in connection with this Trust the following costs, fees and expenses: (a) At the inception of the Trust $150.00; When Base Policy of Title Insurance is prepared $450.00; One year from the date hereof and annually thereafter $50.00; When the Trust is terminated $50.00; (b) For conveying property the following fees: When each Sales Agreement issues $2.50; When each Deed issues $2.50; and 1% of the total bona fide sales price of the property conveyed; said 1% to be figured upon principal and interest of such sales price, and to be withheld from payments as and when made or deducted from any available funds in the hands of the Trustee; provided that when Trustee is called upon to receive any payments or apply any credits under $25.00, Trustee [667] shall receive for each such item 25¢ in lieu of the 1% thereof. (c) 1% of all other funds handled by the Trustee in connection herewith, except the $30,000 deposited for Improvement Fund. (d) In the event that court proceedings are necessary on the part of the Trustee to enforce any contract, or to forfeit and default the rights of any party under any Sales Agreement, the Trustee shall receive, to cover its services in connection therewith, the sum of $75.00 in addition to any court costs or attorney's fees which may be incurred in connection with such enforcement or such forfeiture; provided, however, that in case of forfeiture where no court proceedings are necessary the Trustee shall receive

(Testimony of L. J. Taylor.)

only the sum of $5.00 for its services in connection therewith, together with indemnity from the parties declaring such forfeiture to protect it against any claim which might be asserted by the party against whom such forfeiture is declared. (e) For issuing policies of Title Insurance upon each parcel or lot conveyed under the terms hereof, the sum of 50¢ for each $100.00 or fraction thereof for which such policy is issued; provided, however, that no policy shall be issued for a less fee than $7.50. (f) And reasonable compensation for any service rendered by said Trustee in the execution of this Trust for which the costs, fees and expenses are not herein provided.

SECTION SIXTEEN

THE TRUSTEE shall keep a full and accurate account of all funds received, and disbursements and charges made by it in connection with this Trust, and shall render an accounting upon demand of the Beneficiary; such accounting to be made, however, not more often than once a month. The Trustee shall also keep an accurate account of all property in the Trust, [668] and of lots sold and unsold, and shall render a statement thereof to the Beneficiary, upon demand, provided, however, such statement shall not be required more often than once every three months, and provided further, that each such statement shall supplement but not duplicate the contents of the preceding statement, if any.

THE FOREGOING provision and the charges hereinbefore set out anticipate the keeping of only

(Testimony of L. J. Taylor.)
one account for the Beneficiary and one commission account. If, however, additional commission or other accounts are desired by the Beneficiary or his agents, the Trustee shall be entitled to make an additional charge to cover the cost of the extra service rendered.

SECTION SEVENTEEN

THE TRUSTEE reserves unto itself the right, and shall have the power, for the benefit of the Beneficiary, to mortgage or otherwise encumber, and to replace, renew or extend any mortgage or encumbrance upon all or any portion of the trust property, from time to time, at any time that any such mortgage, encumbrance, replacement, renewal or extension may be, in the judgment of the Trustee, for the best interest of this Trust, or necessary to protect trust property, and upon such terms and conditions and by such means of security as the Trustee may deem proper, including the right and power to convey the fee title to said property to such person or corporation as it shall select for the purpose of executing and delivering the necessary notes, mortgages, deeds of trust or other hypothecation to evidence and secure such debt or debts and of reconveying said property to the Trust subject thereto, and when such reconveyance shall have been so made to the Trustee, said Trustee shall [669] thereupon be restored to its full estate hereunder; provided, however, that no such mortgage or other encumbrance shall be or become a lien prior to the lien of the Payee hereunder.

(Testimony of L. J. Taylor.)

It being distinctly understood that any such conveyance by said Trustee, for the purposes hereinabove stated, shall be in no wise construed as a suspension or termination of this Trust, or as in any way impairing, changing or limiting the powers of the said Trustee as herein expressed and intended.

SECTION EIGHTEEN

ALL INSTRUCTIONS to the Trustee, whether in regard to who the authorized sales agents are, prices of lots, terms of sale thereof, or any other matter within the rights of the Beneficiary shall be in writing and signed by the Beneficiary.

SECTION NINETEEN

IT IS UNDERSTOOD and agreed that the Trustee shall not be liable for any damages arising in connection with the operation or maintenance of said property, and there shall be no financial liability on the Trustee for any improvement placed on said property, or agreed to be placed thereon, but that such liability shall be the liability of the Beneficiary only.

The Trustee shall not be required to attend to or to procure any insurance upon any building situated upon the real property covered hereby, or to pay or attend to the payment, other than from the proceeds of sale as hereinbefore provided, of principal or interest of any debt, lien or encumbrance against the trust property, but all such services shall be performed and all expenses borne by the Beneficiary hereunder or his representatives. [670]

(Testimony of L. J. Taylor.)

The Trustee shall not be required to commence or defend any suit in connection with this Trust or the trust property unless requested in writing so to do, and until there shall have been paid to the Trustee a sum of money sufficient, in its judgment to pay all costs thereof (including attorney's fees) and a reasonable compensation to the Trustee for its services in connection therewith, and should any officer or employee of the Phoenix Title and Trust Company be called as a witness in any case involving or in connection with this Trust or the trust property the Trustee shall be entitled to make a reasonable charge to cover the service rendered.

SECTION TWENTY

IT IS FURTHER UNDERSTOOD and agreed that in the event of any dispute as to the adequacy of any well or wells, pump or pumps or mains installed or proposed to be installed in said subdivision that the opinion of the City Engineer of the City of Phoenix holding office at the time such dispute shall arise shall be final and binding upon the Beneficiary, the Payee and the Trustee. Should such City Engineer of the City of Phoenix decline to give such opinion, then the opinion of the local representatives of the Duro Pump Company or Dayton Pump Company shall be binding upon the Beneficiary, the Payee and the Trustee. All costs of obtaining such opinion shall be borne by the Beneficiary hereunder.

(Testimony of L. J. Taylor.)

SECTION TWENTY-ONE

THE TRUSTEE SHALL, at any time after all the costs, fees, and expenses and advances of the said Trustee have been fully paid, and after payments to the Payee herein of all amounts due said Payee, and after full performance of all the [671] conditions and obligations of this Trust, deed the trust property, or any part thereof, to the Beneficiary, his heirs, executors, administrators or assigns, upon written demand of said Beneficiary, his heirs, executors, administrators or assigns; provided that the Trustee shall not be under any obligation to hold said property for, or convey said property to, any third party by reason of any instructions theretofore given to the Trustee by the Beneficiary, his heirs, executors, administrators or assigns.

AT ANY TIME after three years from the date hereof, the Trustee shall have the right to end this Trust by deeding to the Beneficiary, or his assigns, the property remaining undisposed of and turning over to the said Beneficiary, or his assigns, all moneys remaining in its hands properly payable to said Beneficiary, or his assigns, after deducting from said moneys the fees and charges herein mentioned; provided, however, that the Trust may not be thus terminated so long as the Trustee is under any obligation to any third party to convey or hold said property for the security or protection of such third party, or to carry out any contract or agreement theretofore duly entered into.

(Testimony of L. J. Taylor.)

THIS TRUST shall also terminate upon the sale and conveyance of all of said property together with the payment of the proceeds thereof to the Trustee and the distribution thereof as hereinbefore provided. However, this Trust shall not cease nor terminate in any event until all the costs, fees, charges, expenses and advances of the Trustee hereunder shall have been fully paid. [672]

SECTION TWENTY-TWO

THE TERMS AND CONDITIONS of this Declaration of Trust shall be binding upon and shall inure to the benefit of the heirs, administrators, executors, successors and assigns of the Beneficiary, the Payee and of said Trustee.

IN WITNESS WHEREOF the Phoenix Title and Trust Company has caused its corporate name to be hereunto subscribed, its corporate seal to be hereunto affixed, and these presents to be executed by its Vice-President and Secretary, thereunto duly authorized, this 9th day of January A. D. 1929.

[Seal] PHOENIX TITLE AND TRUST COMPANY

Attest:

(Signed) By THOS. CLEMENTS
Vice-President.

(Signed) L. J. TAYLOR
Secretary

(Testimony of L. J. Taylor.)

CERTIFICATE

KNOW ALL MEN BY THESE PRESENTS:

That THOMAS J. TUNNEY hereby declares that the foregoing Declaration of Trust was prepared at his request, and that the said Declaration of Trust sets forth all of the terms and conditions of said Trust, and that he does hereby agree to, approve, ratify and confirm the foregoing Declaration of Trust in all its particulars.

IN WITNESS WHEREOF he has hereunto set his hand, the 9th day of January A. D. 1929.

[Seal] (Signed) THOMAS J. TUNNEY

PAYEE'S APPROVAL

KNOW ALL MEN BY THESE PRESENTS:

That MARGARET B. BARRINGER, Payee under the [673] foregoing Declaration of Trust, does hereby agree to, approve, ratify and confirm the said Declaration of Trust in all its particulars.

Dated at St. Davids, Penna., this 5th day of January, A. D. 1929.

(Signed) MARGARET B. BARRINGER."

Witness

(Signed) ELIZABETH CRAIG

THE WITNESS RESUMING:

I am familiar with the handwriting of Thomas J. Tunney. Examining the instrument you hand me,

(Testimony of L. J. Taylor.)

which is a note dated December 20th, in the sum of $85,000, payable to Margaret B. Barringer, purporting to be signed by Thomas J. Tunney, the signature thereon is Mr. Tunney's signature.

Thereupon said note was introduced in evidence as

RESPONDENT BARRINGER'S EXHIBIT No. 3

which exhibit is in words and figures as follows, to-wit:

"$85,000.00 Phoenix Arizona, December 20, 1928

"Three years after date, for value received, I promise to pay to MARGARET B. BARRINGER or order, at 130 West Adams Street, Phoenix, Arizona, the sum of EIGHTY-FIVE THOUSAND and no/100 Dollars, with interest thereon from December 20, 1928 to maturity of this note, at the rate of seven per cent per annum, payable quarterly.

"Should the interest as above not be paid when due, it shall thereafter bear interest at ten per cent per annum until paid.

"Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note, with interest from date of such default at ten per cent per annum until paid on the entire unpaid principal and accrued interest.

(Testimony of L. J. Taylor.)

"Should the principal hereof not be paid in full at maturity, it shall thereafter bear interest at ten per cent per annum until paid.

"Principal and interest payable in lawful money of the United States of America.

"Should suit be brought to recover on this note, I promise to pay as attorney's fees 5% additional on the amount found due hereunder.

[674]

"This note is secured by Declaration of Trust No. 418 of the Phoenix Title and Trust Company."

(Signed) THOMAS J. TUNNEY."

The reverse side of said exhibit bears the following endorsement: "Interest credited hereon to Jan. 10, 1929, date of closing transaction as per agreement between parties. By Phoenix Title & Trust Company (signed) L. J. Taylor, Trust Officer."

THE WITNESS RESUMING: I have in my custody an instrument dated April 4, 1929, modifying said Declaration of Trust.

The witness produced the instrument referred to. Thereupon, it was received in evidence as

RESPONDENT BARRINGER'S EXHIBIT No. 4

Said exhibit is a written agreement executed by Phoenix Title and Trust Company, Margaret B. Barringer, L. D. Owens, Jr., H. C. Dinmore and

(Testimony of L. J. Taylor.)

S. W. Mills. It recites that the interest of Thos. J. Tunney under the Declaration of Trust [675] has been assigned to Owens, Dinmore and Mills. It is agreed between the parties executing it that said Declaration of Trust is amended by substituting the following clauses in lieu of paragraphs (a) and (b) in Section Two thereof, to-wit: "(a) Not less than 10% of the sales price in cash at the time of entering into a sales agreement. (b) The balance of such sales price to be paid in monthly, quarterly, semi-annually or annual payments."

THE WITNESS RESUMING: I have in my custody an instrument dated March 1st, 1930, modifying said Declaration of Trust. (69).

The witness produced the instrument referred to. Thereupon, it was received in evidence as (72)

RESPONDENT BARRINGER'S EXHIBIT No. 5

Said exhibit is a written agreement dated March 1, 1930, duly executed by Respondent Barringer, Phoenix Title and Trust Company, L. D. Owens, Jr., H. C. Dinmore and S. W. Mills. By its terms those two certain paragraphs of Respondent Barringer's Exhibit No. 2, commencing with the words "Parcels or lots covered hereby" (being commencement of fifth paragraph, see page 205, ante) and ending with the words "succeeding its application by the Trus-

(Testimony of L. J. Taylor.)

tee" (being end of sixth paragraph, see page 206, ante), are cancelled and the following paragraphs are inserted in lieu thereof, to-wit:

"LOTS in Windsor Square, into which the said property has been subdivided, may be released, provided no default exists under the terms hereof at the time of demand and payment therefor, from the lien of the hereinbefore described debt, upon the payment to the Trustee—for the account of the Payee—of the release price as set forth in Exhibit 'B' [676] Amended, attached hereto and by reference made a part hereof; it being specifically agreed by all of the parties hereto that all other lots in Windsor Square have been heretofore released from all lien, claim or demand on the part of the Payee, and that the lots set forth in said Exhibit 'B' Amended are the only lots remaining subject to said lien.

THE FUNDS received by the Trustee from the release of lots, or accumulated by the Trustee for application upon the release price of lots, shall be applied by it on the principal of the debt secured hereunder;

Interest on amounts applied on principal, however, shall not cease until the quarterly interest paying date next succeeding such application by the Trustee."

Said agreement contains the further provisions, to-wit:

(Testimony of L. J. Taylor.)

"And all of Section Two as modified by said Modification of Declaration of Trust is hereby cancelled in full and in place thereof the following is substituted, to-wit,

'TO RECEIVE PAYMENTS for, deed and convey the real property covered hereby, being lots in the Windsor Square into which said property has been subdivided, upon such terms and for such prices as said Trustee may be instructed in writing so to do by the Beneficiaries, provided that before making such conveyance the Trustee shall have received for benefit of the Payee the net release price as set forth in Exhibit 'B' Amended above referred to, which amount may be paid either in cash in one lump sum or accumulated by the Trustee under the provisions of 'Section Four' as modified hereby; and provided, further, that in the case of contract sales the selling price of said [677] property shall be not less than two times the release price as set forth in said Exhibit 'B' Amended, unless at the time of making such sale there shall be paid to the Trustee the entire release price for the benefit of the said Payee, and provided, also, that the minimum terms of any time sale shall be as follows: (a) Not less than 10% of the sales price in cash at the time of entering into a sales agreement; (b) The balance of such sales price to be paid in monthly, quarterly, semi-annually or annual payments.'

(Testimony of L. J. Taylor.)

And all of Section Four of said Declaration of Trust is hereby cancelled in full and in place thereof the following is substituted; to-wit,

'DISTRIBUTION of the proceeds (principal and interest) received by the Trustee, arising from each sale of said property (unless the entire release price shall be paid at the time of making such sale) shall be made by the said Trustee as follows:

(1st) The first twenty-five per cent (25) thereof shall be disbursed as follows: (a) To the payment of the costs, fees, charges and advances, if any, hereunder of said Trustee; (b) To the payment of taxes and assessments levied and assessed against said property, including assessments of the Salt River Valley Water Users Association, if any; said Trustee, however, not to be liable for non-payment of any such taxes or assessments in event said Trustee deems moneys hereunder not properly available therefor; (c) And the remainder, if any) to the order of the Beneficiaries hereunder.

(2nd) All further sums over and above the first twenty-five per cent (25%) shall be disbursed as follows: (a) Eighty per cent (80%) thereof to the Payee to apply (1) To the [678] accumulation for and payment hereunder to the Payee of the release price of the lot or lots

(Testimony of L. J. Taylor.)

covered by such sale as set forth in said Exhibit 'B' Amended; (2) And the remainder, if any, as provided for the remaining 20% of said portion as provided in distribution '(b)' following. (b) The remaining twenty per cent (20%) thereof shall be disbursed as follows: (1) To the payment of the costs, fees, charges and advances, if any, hereunder of said Trustee; (2) To the payment of taxes and assessments levied and assessed against said property, including assessments of the Salt River Valley Water Users Association, if any; said Trustee, however, not to be liable for non-payment of any such taxes or assessments in event said Trustee deems moneys hereunder not properly available therefor; (3) At the sole discretion of said Trustee to the Improvement Fund, as provided in 'Section Five' of said Declaration of Trust, for distribution therefrom unless said Trustee shall have received evidence satisfactory to it of the payment in full of all costs and expenses incident to the improvement of the property covered by this Trust and compliance by the Beneficiaries with agreements or representations made by them to purchasers of lots in said subdivision (if any claim or notice shall have been filed with the Trustee of non-compliance with such representations); (4) To the payment of interest on the unpaid portion of the indebtedness hereinbefore described to the next succeeding quarterly interest paying date.

(Testimony of L. J. Taylor.)

(5) After the Trustee shall have been satisfied that the funds in its hands are sufficient to meet the provisions of (1), (2), (3), and (4) of this distribution (b), or after payment in full of the said sums, to the order of the Beneficiaries under this Trust.'

If any terms of the original Declaration of Trust or of the previous Modification thereof above mentioned are in [679] conflict with the provisions as set forth in this Modification, the provisions of this Modification shall prevail as against any other conflicting provisions.

This Modification shall be binding upon the Payee, the present Beneficiaries and their heirs, administrators, executors, successors and assigns."

Exhibit B, referred to in Respondent Barringer's Exhibit No. 5 is thereunto annexed and is in words and figures as follows, to-wit:

"EXHIBIT 'B' AMENDED

Schedule of Release Prices of Lots in Windsor Square held under Trust No. 418 of Phoenix Title and Trust Company, effective March 1st, 1930.

BLOCK 1			Block 1 Cont'd.			Block 1 Cont'd.		
			"	7	250	"	18	500
Lot	2	$250	"	8	250	"	19	500
"	3	250	"	9	250			
"	4	250	"	10)	750		BLOCK 2	
"	5	250	"	11)		Lot	3	$400
"	6	250	"	16	400	"	4	500

(Testimony of L. J. Taylor.)

Block 2 Cont'd.

Lot	5	$375
"	6	500
"	8	500
"	10	500
"	11	275
"	12	500
"	13	275
"	15	275
"	16	500
"	17	275
"	18	500
"	19	275
"	20	500
"	21	325
"	22	500
"	23	275
"	27	275
"	29	275
"	31	275
"	32	500
"	33	275
"	34	500
"	36	500
"	38	500
"	41	375
"	42	450

BLOCK 3

Lot	2	$500
"	3	600, Sold Not Released.
"	4	600
"	6	600
"	7	600
"	8	600

Block 3 Cont'd.

Lot	9	$600
"	10	600
"	11	600
"	12	600
"	13	600
"	14	600
"	15	600
"	16	600
"	17	600
"	18	750
"	19	600
"	20	750
"	22	600
"	23	600
"	25	600
"	26	600
"	27	600
"	28	600
"	29	600
"	30	600
"	32	600
"	33	600
"	34	600
"	35	600
"	36	600
"	37	100 Pd.
"	39	600

BLOCK 4

Lot	2	$400
"	3	600
"	7	275
"	8	500

[680]

Block 4 Cont'd.

Lot	9	$275
"	11	275
"	12	500
"	13	275
"	14	500
"	15	275
"	16	500
"	17	275
"	19	275
"	20	450
"	21	275
"	24	300 Sold, Not Released.
"	25	250
"	26	2,000
"	27	500
"	28	500

BLOCK 5

Lot	3	$400
"	5	450
"	6	500
"	9	500
"	11	500
"	13	500
"	15	500
"	16	500
"	17	500
"	19	400
"	22	600
"	23	475
"	24	650 Pd.

BLOCK 6

Lot	1	$375
"	3	400

(Testimony of L. J. Taylor.)

Block 6 Cont'd.

Lot	5	$400
"	8	450
"	9	500
"	10	450

BLOCK 7

Lot	2	$450
"	3	450
"	4	500
"	5	500
"	6	500
"	7	500
"	9	600
"	10	500
"	11	600
"	12	500
"	13	600
"	14	500
"	15	600
"	16	500
"	17	600
"	19	750
"	21	750
"	23	600
"	25	600
"	26	500
"	27	600
"	29	600
"	31	600
"	33	500
"	34	500
"	35	500

Block 7 Cont'd.

Lot	36	$100
"	37	450
"	38	450

BLOCK 8

Lot	1	$500
"	2	500
"	3	500
"	4	500
"	5	500
"	6	500
"	7	500
"	8	500
"	9	500
		Sold,
Not Released.		
"	10	500
"	11	500
"	12	600
"	13	500
"	15	500
"	17	500
"	18	500
"	19	500
"	20	500
"	22	500
"	23	500
"	30	375
"	32	375
"	33	375
"	34	375
"	35	375

Block 8 Cont'd.

Lot	36	$375
"	37	375
"	38	375
"	39	375
"	40	375
"	41	375
"	42	375
"	43	400
"	44	450

BLOCK 9

Lot	1	$3,000
"	3	250
"	4	250
"	5	250
"	6	250
"	7	250
"	10	250
"	11	250
"	12	250
"	13	400
"	14	500
"	15	450
"	16	450
"	17	450
"	18	450
"	19	450
"	20	450
"	21	350
"	28	400"

(Testimony of L. J. Taylor.)

The WITNESS Resuming: The paper shown to me by counsel is a copy of a notice which I, as Secretary of Phoenix Title and Trust Company, received on November 5, 1930 (72-73).

Thereupon, the instrument referred to was received in evidence as [681]

RESPONDENT BARRINGER'S EXHIBIT No. 6

Said exhibit is in words and figures as follows, to-wit:

"Phoenix, Arizona.
November 5th, 1930.

THOMAS J. TUNNEY,
L. D. OWENS, JR.,
MARY MARGARET OWENS,
H. C. DINMORE,
ESTELLE DINMORE,
S. W. MILLS,
DOROTHY MILLS,
WINDSOR SQUARE DEVELOPMENT COMPANY, INC.,
WINDSOR SQUARE IMPROVEMENT COMPANY,
PHOENIX TITLE & TRUST COMPANY,
L. D. OWENS, JR., and H. C. DINMORE,
doing business under the name of Owens-Dinmore Company:

YOU, AND EACH OF YOU, ARE HEREBY NOTIFIED: That Margaret B. Barringer is the owner and holder of that certain promissory note

(Testimony of L. J. Taylor.)

dated December 20th, 1928, executed by Thomas J. Tunney, payable to the order of Margaret B. Barringer, in the principal sum of Eighty-five Thousand ($85,000.00) Dollars, which said promissory note is secured by Declaration of Trust, dated January 9th, 1929, as amended by modification of Declaration of Trust dated March 1st, 1930, and that said Margaret B. Barringer, pursuant to the provisions of said promissory note and said Declaration of Trust and modification thereof, has declared the whole principal sum, together with all interest accrued thereon, in accordance with the terms and provisions of said promissory note, to be immediately due and payable, together with all sums which the said Thomas J. Tunney, by virtue of [682] said promissory note and/or Declaration of Trust or modification thereof, has agreed or in any way become obligated to pay. This action is taken on account of default of payment of interest on said note.

Yours very truly,
(Signed) ELLINWOOD & ROSS
Attorneys for
Margaret B. Barringer."

The WITNESS Resuming: Phoenix Title and Trust Company paid taxes levied on the premises described in the Declaration of Trust with moneys advanced by Mrs. Barringer. The tax receipts shown

(Testimony of L. J. Taylor.)

to me by counsel correctly show the amount of taxes so paid.

The tax receipts referred to were riveted together. Thereupon, they were received in evidence as

RESPONDENT BARRINGER'S EXHIBIT No. 7

Said exhibit consists of seven separate receipts executed by the Treasurer of Maricopa County, duly acknowledging receipt in the aggregate of $1,616.98 in payment of taxes levied in 1930 upon the premises involved in this controversy. Said receipts show such payments were made on November 4th, 1930, the day on which said taxes became delinquent.

The WITNESS Resuming: The expenditures aggregating $1,957.93, shown upon the instrument handed to me by counsel, were consented to by Phoenix Title and Trust Company (76), which did not disapprove of them (77). There has not been much change in the conduct of Phoenix Title and Trust Company with respect to the property described in the Declaration of Trust since the filing of the petition in bankruptcy. We, frankly, have been at sea as to whom was the proper [683] beneficiary and I have had considerable conversations with everybody involved, attorneys and otherwise. The trust has remained practically in status quo during this time. Very little has been going on to the extent of getting any money out of it. There

(Testimony of L. J. Taylor.)
have been some receipts; the disposition has been to hold them (78).

Cross-Examination by Mr. Nealon

I handled this transaction, except as to minor details, practically since its inception. There was a consideration paid in the transaction, but not by Phoenix Title & Trust Company. At the time of the passing of the deed, $20,000 cash was paid into our hands by L. D. Owens, Jr. So far as I know, nothing has been paid previous to that time. At the same time the $20,000 was paid, Mr. Owens paid other money into our hands. He paid us all told $50,000. Another ten thousand was subsequently paid by other parties, $7500 being paid by H. C. Dinmore and $2500 by S. W. Mills. Mr. Owens made his payment on January 11, 1929. That was the payment of $50,000, and was paid by cashier's check delivered to me by Mr. Owens. The ten thousand was paid on January 14, 1929. Mr. Tunney is a clerk in Phoenix Title & Trust Company, having been there for several years. He put up no part of the consideration, but he received compensation of $20 for signing the note. The note was signed by him about the time this whole thing was done. I cannot tell the exact date because the note is dated one date in December and the transaction was closed at a later date in January. Tunney executed the note between that time and the actual signing of the declaration of trust. I am sure the note was not signed on the actual date it bears because I put an endorsement on the note of interest being credited

(Testimony of L. J. Taylor.)

so it would [684] not be charged up prior to the delivery of the note. The probabilities are that the declaration of trust was not signed on the date it bears, which is January 9th. The reason for this is that the instrument by which we acquired title was not recorded until January 14th. The complete terms of the deal were settled as of January 9th. The money was paid to us on the 11th and 14th, respectively, and we recorded the deed on the 14th. I feel sure I did not sign the instrument until we had title, and I am satisfied that the instrument was signed by Phoenix Title & Trust Company on January 14th, when the deed was recorded. It was signed by other parties prior to that time. The instrument was complete at the time we signed it. It was executed in triplicate, one copy being delivered to Mrs. Barringer, one to L. D. Owens, and the other is the copy in evidence here. The purpose of having Mr. Tunney sign the note, as stated to me by Mr. Owens, was that Owens did not want the personal liability. Our check for the taxes was drawn on November 3, 1930, and payment was made direct to the treasurer by us. The receipts that I spoke of having been received since bankruptcy were payments upon lots previously sold. We have had no other source of income except what Mrs. Barringer put into our hands for this purpose.

Redirect Examination by Mr. Mackay.

The total consideration for this transaction was $105,000, of which $20,000 was paid in cash and

(Testimony of L. J. Taylor.)

$85,000 by the Tunney note. We paid all told to Mrs. Barringer or to Mr. Bennitt as her agent, $20,000 cash in connection with the sale. These other payments made into our hands were for purposes covered in the declaration of trust. Since the filing of the petition in bankruptcy our company, as trustee under this [685] declaration of trust, has executed conveyances covering lots in Windsor Square. There has been no change in our procedure concerning the title on things paid out since bankruptcy started. I am not prepared to say whether anybody has paid out and gotten deeds or not. I haven't looked it up to see.

"Mr. MACKAY: Has your company, Mr. Taylor, conveyed any lots the release prices of which have been paid, or in part paid, since the beginning of these proceedings, I will ask you first, do you know whether it has?

The WITNESS: Yes, there have been some conveyances."

Re-cross Examination by Mr. Nealon

"Mr. NEALON: Were they all lots that are involved in this hearing, Mr. Taylor?

The WITNESS: You will have to make that a little more definite, Mr. Nealon.

Mr. NEALON: Were they all lots that had been released from any claim of Margaret B. Barringer prior to the pendency of the bankruptcy proceedings?

(Testimony of L. J. Taylor.)

The WITNESS: Some of them were. I am not positive whether there were any lots that hadn't been released by Mrs. Barringer before the bankruptcy started that have been conveyed. I cannot answer that question as to whether any of them included the lots upon which Mrs. Barringer had a lien at the time of the bankruptcy. I know that some were conveyed which had been released prior to that time.

Mr. NEALON: Do you know whether any of those deeds were executed on the contracts that had been made prior to bankruptcy?

The WITNESS: No, I don't know.

Mr. NEALON: Will you furnish the Court with a list of the deeds executed by you since the adjudication of bankruptcy [686] or since the filing of the petition in bankruptcy, which was October 25 last?

The WITNESS: I can have such a list prepared. I cannot give it to you.

Mr. NEALON: So far as I am concerned, I am willing to stipulate that such a list may be received in evidence upon Mr. Taylor's certificate.

Mr. MACKAY: We will so stipulate. I suppose it would be well to see whether the release price in some instances was paid after the date of bankruptcy. Could you show that also, Mr. Taylor?

The WITNESS: Yes, sir."

(Testimony of L. J. Taylor.)

Thereupon, the list of lots referred to was prepared by Mr. Taylor and was received in evidence as

RESPONDENT BARRINGER'S EXHIBIT No. 13

Said exhibit is the written statement of L. J. Taylor, dated December 12th, 1931, to the effect that the only lot released by Phoenix Title and Trust Company from Barringer's lien since October 25th, 1930, is Lot 2, Block 1, of Windsor Square and that the same was deeded to W. R. Wells December 4, 1930, pursuant to a sales agreement entered into on October 15th, 1930. Said exhibit also contains the statement that all other lots described in trustee's petition to marshal liens and, in addition thereto, Lot 28, Block 9, of Windsor Square are still held by Phoenix Title and Trust Company as Trustee under the Declaration of Trust and that there are outstanding sales agreements on the following described lots:

Lot 16	Block 1;
Lot 22	Block 3;
Lots 2 and 24	Block 4;
Lots 15, 17, 23, 25 and 26	Block 7;
Lot 9	Block 8.

[687]

Said exhibit also contains the statement that the printed form of deed annexed thereto has been used by Phoenix Title and Trust Company in making conveyances, as Trustee, of all lots in Windsor

(Testimony of L. J. Taylor.)

Square. Said warranty deed, annexed to the exhibit, is in the customary form, "Phoenix Title and Trust Company, Trustee," being named therein as grantor. It contains various and sundry building restrictions, which are not material to this controversy, together with usual covenants of warranty.

M. L. HARTLEY

called as a witness for Respondent Barringer testified as follows:

Direct Examination by Mr. Mackay

I am treasurer of Phoenix Title & Trust Company. Its books and records are kept under my supervision. I became treasurer in January, 1929. In January, 1929, I was notified by the directors or officers of the company that it had executed this declaration of trust, and a copy was placed in my custody. We set up a main trust ledger concerning the trust and also individual contracts concerning each lot that was sold. From time to time we received payments from lot purchasers. Our department made allocation and disbursement of such moneys. The payments were split up in accordance with the declaration of trust. The records I have contain a complete statement of all payments made to our company by lot purchasers and also contain accurate statements of how the money has been disbursed or allocated by our department. [688] I have recently examined the records and from such examination can state that the amount of money which has been collected from contracts in Windsor

(Testimony of M. L. Hartley.)

Square and applied to the Barringer indebtedness consisting of the $85,000 note signed by Tunney, is $15,125.30, leaving a balance of $69,974.70. According to our records, the interest on the Tunney note has been paid to December 20, 1929, the interest coming from beneficiary funds. No moneys have been received by our company since that date. Since October 25, 1930, some payments have been coming in from contract purchasers. The amount of such accruals to date is $2,015.44. This is not the total amount received because certain expenses and fees of the trustee have been deducted. After paying these fees and expenses of the trustee, we had on hand on November 14th, $2,320.24. Of the money collected, we allocated $165.33 to the improvement fund, and we have $2,015.44 to apply upon this note. We have not made such application on account of these proceedings. We were ordered by the trust department not to disburse any funds from that trust. The order was made shortly after the bankruptcy proceedings were started.

Cross-Examination by Mr. Nealon

The application of $15,125.60 upon the Tunney note leaving a balance of $69,974.70, was all done prior to the bankruptcy proceedings on October 25, 1930, and since that time, the trust has been held in status quo. I cannot at this time separate the figures showing what collections were upon the lots involved in these proceedings. The $165.33 which I said went into an improvement fund has not been applied as

(Testimony of M. L. Hartley.)

yet. We are holding that. The total amount we were holding on November 14, 1931, was $2,320.24. Since that time, there have been three collections which total $125. We have no charges [689] made against this estate prior to October 25, 1930, which have not been paid. The amount that was applied as payment on principal on the Tunney note should be $15,025.30, instead of $15,125.30 as I testified. That was an error in subtraction.

WM. H. MACKAY

called as a witness for Respondent Barringer testified as follows:

On November 5th, 1930, acting on behalf of Respondent Barringer, I delivered to L. D. Owens, Jr. and Thos. J. Tunney, respectively, true copies of the notice which has been received in evidence as Respondent's Exhibit No. 6. On the same day I deposited a copy of said notice in the United States mail in an envelope addressed to Windsor Square Development, Inc., in care of L. D. Owens, Jr. at the San Carlos Hotel, Phoenix, Arizona, where I knew Owens then was living (136).

Cross-Examination by Mr. Nealon

I have no recollection of serving such notice on the Trustee in Bankruptcy or in the Referee's Court (136).

E. J. BENNITT

called as a witness for Respondent Barringer testified as follows:

During the past forty nine years I have been engaged in the real estate business at Phoenix. My business has been very active during the last ten or fifteen years (137). [690] I have kept posted on sales made by other brokers. Mrs. Barringer is my sister-in-law. She has been away from Phoenix for thirty eight years. I have watched out for her interests (138). I paid Phoenix Title and Trust Company the money it used in paying the taxes evidenced by Respondent Barringer's Exhibit No. 7. Mrs. Barringer reimbursed me (139). I went to San Diego in June or July, 1930. There I received notice that the power company had shut off the street lights in Windsor Square. It left the power for pumping the water to residents of the subdivision but notified that this, too, would be shut off unless some arrangements to pay its bills were made. Mr. Schrader, who was the caretaker of the pump and premises in general, notified me that neither Owens nor the Trust Company would pay the bills (142). Schrader told me that if the bills were not paid he would quit. I told him I would pay his salary. I have in my possession a memorandum of all payments which I made for Mrs. Barringer to the power company, to Mr. Schrader, and to other persons in connection with the preservation and care of Windsor Square (143). A large part of the payments shown by said Statement were to Central Ari-

(Testimony of E. J. Bennitt.)

zona Light & Power Company in payment of its bills for electricity used for pumping the water to the occupants of the subdivision and for watering trees on the unoccupied portions thereof. Other items are for Schrader's salary (144). Other items represent cash given Schrader to purchase supplies, parts for the pump and cleaning up the subdivision (145). All the expenditures were necessary to keep Windsor Square in proper shape and decent appearance.

The witness produced the memorandum referred to. Thereupon, it was received in evidence as

RESPONDENT BARRINGER'S EXHIBIT No. 8

Said exhibit reads in words and figures as follows:

[691]

"MEMORANDUM OF ADVANCES MADE BY MARGARET B. BARRINGER FOR ACCOUNT OF OPERATING EXPENSES OF WINDSOR SQUARE, TO DECEMBER 31st, 1930.

1930			
July 15	Balance due for power to June 7	$145.22	
Aug. 4	Power bill to July 8	58.65	
Aug. 8	Caretaker's balance to Aug. 7	55.97	
Aug. 21	Power bill to Aug. 7	78.70	
Aug. 21	Repairs to motors	28.00	
Aug. 25	Welding Co. for repairs to pipe line	38.50	
Aug. 26	Caretaker's salary to Sept. 5	60.00	
Sept. 3	100 feet of 2½" hose and couplings	43.00	
Sept. 3	75 tree stakes	24.90	
Sept. 3	Balance due Schrader for sundries	6.51	$539.45

(Testimony of E. J. Bennitt.)

1930				
Oct.	22	Hammer and saw	$ 1.75	
Oct.	30	Tool box and fixtures	6.10	
Oct.	30	Scythe and hose	11.00	
Oct.	8	Schrader salary to 10/5/30	60.00	
Oct.	8	Shovel and oil	4.87	
Oct.	30	Power bill to 9/8/30	79.40	
Oct.	30	Labor account of cleaning	67.50	$238.62
Oct.	31	First half of 1930 taxes		$629.64
Nov.	3	Schrader salary to November 5	85.00	
Nov.	7	Account cleaning lots	27.00	
Nov.	7	Schrader sundry expenses	31.10	
Nov.	9	100 stakes	31.45	
Nov.	15	Account cleaning lots	22.50	$198.49
Dec.	6	Schrader salary to 12/5/30	85.00	
Dec.	6	Sundries and tools	44.97	
Dec.	14	150 stakes	43.95	
Dec.	20	Power bill to 12/8/30	186.75	$362.47
				$1957.93''

The WITNESS Resuming: There are 275 lots in Windsor Square. About 80 lots have been released from Mrs. Barringer's lien, leaving about 195 lots subject thereto (147). I know the location of the unreleased lots. They should have a sales value of from $400 to $800 each (148). Under present market conditions I would be surprised if they could be sold for cash as a [692] whole for $50,000 (149). I base my opinion more on general business conditions than anything else (150). The unreleased lots have no improvements on them (151).

(Testimony of E. J. Bennitt.)

Cross-Examination by Mr. Nealon

My opinion is not based on any sales which actually took place in Windsor Square. If it were based on the last actual sales my estimate would exceed $50,000. I know of no sales having been made for the past year or two (151). I know of no sheriff's sales within the tract nor do I know of any sales of similarly improved property in the vicinity of Windsor Square (152). In making my estimate I did not separately value each lot. I took into consideration the value of the improvements placed in front of these lots. Land of this character, if put on the market at forced sale, does not bring but a fraction of what it is really worth (154). The lot at the corner of Central and Colter streets ought to be worth several times $800. The same is true of the lot at the corner of Camelback and Seventh Street (155). The last payment for the preservation of the property was made December 20th, 1930. I told the Trustee in Bankruptcy I would pay the December bills. I wished the future payments off upon him (155). I introduced him to the caretaker and turned the caretaker and premises over to him. The payment for taxes is included in Respondent Barringer's Exhibit No. 8 (156).

Redirect Examination by Mr. Mackay

By real value I mean the value of the property when business conditions improve, which will be several years hence. The only way the lots could be sold is piece-meal (158). [693]

(Testimony of E. J. Bennitt.)

Recross Examination by Mr. Nealon

I base my opinion that recovery will not come for several years on a "hunch" (160). Former values may never come back (161).

HARRY KAY

called as a witness for Respondent Barringer testified as follows:

For the last twenty years I have been engaged in the real estate business in Phoenix. I am familiar with the price at which real estate in this vicinity has from time to time been sold. In 1912 I purchased sixty acres a half mile north of Windsor Square (162). The tract was unimproved. In 1928 I sold it for a little over a thousand dollars an acre (163), receiving $25,000 in cash, the balance secured by a mortgage. The purchaser now wants to turn the property back to me for a release of the mortgage. There are 70 acres in the subdivision Windsor Square (164). In my opinion the value of Windsor Square, excluding the lots occupied by buildings, is between $1,000 and $1,200 per acre (165-166).

Cross-Examination by Mr. Nealon

"Mr. NEALON: What is the market value of the unimproved lands in that immediate section, Mr. Kay?

The WITNESS: Well, I would be glad to take $750 an acre for mine now.

(Testimony of Harry Kay.)

Mr. NEALON: I move to strike out the answer as not being responsive to the question.

The REFEREE: Just answer the question as indicated."

The WITNESS: Well, it would depend whether it is upon that paved road. It would be more than if it is back a little bit. In my opinion, the value of the eighty acres just [694] north of this property—just across Colter Street—is around six or seven hundred dollars an acre. Windsor Square I place at a higher valuation, at $1,000 to $1,200 an acre, because it is on the main highway and paved. I consider the valuation of the paving and the cost of the improvements in that. I do not know the cost per lot of the paving there. Referring to the map of the subdivision, I would value Lot 3 in Block 1 at $400. Lots 4 and 5 in the same block would be the same value. Lot 10 in the same block I think $300 would be a good price for that, and Lot 11 about the same. Lot 18 in Block 1 I would say about $350. I am taking into consideration that it is paved in front of that lot. I am familiar with the cost of paving generally in the city. This lot being practically 60 feet, the cost of the paving equal to that in front of that lot, would be between $250 and $300. If they paid cash for the paving, there would be a considerable discount. Lot 19 would be about the same value. In Block 2, I would value Lot 18 at around $350. Without the paving, I would probably value it at $200. The paving adds a great deal to it. A great many people would rather buy a lot without the paving. I wouldn't say that when the paving is

(Testimony of Harry Kay.)

paid for, but the lot is bound to be cheaper. I do not know that the paving here is all paid for. Lot 14 in Block 1 I would value at around $400. Lot 40 in Block 2 I would value right around $550. Lot 1 in Block 3 I would value at $600. Lot 38 in Block 3 about $650. Lot 10 in Block 5 about $550. Lot 14 in Block 8 $450. Lot 21 in Block 8, $650 or a little more. Lot 1 in Block 9 is worth $1200. Lot 26 in Block 4 about $1800. I do not know of any sales of property improved similarly to Windsor Square that have been made within the last year—not vacant lots. I am basing my opinion on my own judgment. My own judgment is based on a little common horse sense. It is [695] my own personal opinion; that is the only ground I have. I based my opinion of the value of ten to twelve hundred dollars per acre which I placed upon the whole tract solely upon my own opinion, and I have no further grounds for that opinion than I have given here.

Redirect Examination by Mr. Mackay

There have been no sales in that vicinity within the past year. It is awful hard to make a sale at any price now.

Recross Examination by Mr. Nealon

Although there have been no sales, I have formed my opinion from my own personal knowledge, knowing what I know about property. I have a home on Central Avenue. On the basis at which I am valuing this property, my property cannot be worth one-fifth of what I paid for it. I would not be willing to sell my own home for what I paid for it, because I don't need to sell it right now.

GEORGE E. LILLEY

called as a witness for Respondent Barringer testified as follows: (178)

"Mr. MACKAY: You are the trustee for the bankrupt in this case, are not not, Mr. Lilley?

The WITNESS: Yes, sir.

Mr. MACKAY: And you have had a fairly long and varied experience as a realtor in this city, have you not?

The WITNESS: Yes.

Mr. MACKAY: At the present time you are president of the Dwight B. Heard Investment Company, are you not?

The WITNESS: Yes. [696]

Mr. MACKAY: And you are familiar with values of real estate in Phoenix and vicinity?

The WITNESS: Yes, I think so.

Mr. MACKAY: And you have consummated yourself and supervised the consummation by other men in your company of numerous real estate sales and trades, and you have observed sales and exchanges that have been made by other firms in this city for many years?

The WITNESS: Yes.

Mr. MACKAY: And as such you have acquired sufficient knowledge of the conditions and circumstances surrounding the real estate values in the city of Phoenix and vicinity to form an opinion as to the value of most any real estate, have you not?

The WITNESS: Yes, I can always form an opinion of anything I examine.

(Testimony of George E. Lilley.)

Mr. MACKAY: And you have sufficient knowledge and information upon which to form an opinion as to the cash sale value of property which is not released from the declaration of trust in the Windsor Square Development, Incorporated? I am not asking you for your opinion yet but I am asking you if you have one.

The WITNESS: Yes, I can form an opinion upon that all right.

Mr. MACKAY: Now, let us assume, Mr. Lilley, if we were to hold a sale of all the property in Windsor Square which has not been released from the declaration of trust, could you form an opinion as to what would be the highest cash offer which would be made for a sale of that property en masse, not by separate lots but in its entirety? [697]

Mr. NEALON: I object to that, if your Honor please, adding to our other objections, that it is no way to fix values. You cannot tell in that way that the best cash bid would be made.

The REFEREE: Well, what cash would be paid would hardly fix value. The objection is sustained.

Mr. MACKAY: An exception.

You may answer, Mr. Lilley.

The WITNESS: I don't believe I want to make a guess on what cash offer could be obtained at this time. It would be a random guess. I don't think it would be worth anything at all.

Mr. MACKAY: Have you an opinion as to the present cash value of that property in its entirety?

The WITNESS: Yes, I would have to do a little

(Testimony of George E. Lilley.)

figuring to arrive at what my opinion would be, but it would be based on sales that have been made there recently in the tract.

Mr. MACKAY: It would be based upon what you consider the cash value of each separate lot and then making an aggregate of such values, would it?

The WITNESS: Yes, with some deduction, of course, for making a wholesale trade.

Mr. MACKAY: It would be impossible, would it not, to sell those lots separately for a sum we will say as high as sixty or seventy thousand dollars, by selling the entire tract to one purchaser?

Mr. NEALON: I object to that. In the first place it is a leading question. In the second place it is not clear. [698]

Mr. MACKAY: I am asking you, of course, for your opinion.

The WITNESS: Yes, I don't believe I quite got that.

Mr. MACKAY: Will you read him the original question, please, Mr. Reporter?

(Thereupon the original question was read aloud by the reporter, as follows:)

'Question: It would be impossible, would it not, to sell those lots separately for a sum we will say as high as sixty or seventy thousand dollars, by selling the entire tract to one purchaser?'

The WITNESS: I don't see how you can sell that separately——

Mr. MACKAY: I will strike the question. It is ambiguous.

(Testimony of George E. Lilley.)

Mr. MACKAY: In your opinion, Mr. Lilley, at the present time could a sale of the entire tract be made to any person or corporation for a sum as high as sixty or seventy thousand dollars?

Mr. NEALON: I object to that, if your Honor please. That is no way to prove value, and there are several very important elements omitted, if he is going to prove that.

The REFEREE: Oh, the question may be answered.

The WITNESS: Well, on the basis of the present market it would be hard to get a cash offer for the whole tract at all.

Mr. MACKAY: At any price?

The WITNESS: Yes, sir.

Mr. MACKAY: Let me ask you, Mr. Lilley, do you feel if you offered those lots separately that they could all [699] be sold at a single sale?

The WITNESS: I don't quite understand how you could sell them separately and have a single sale.

Mr. MACKAY: Let me explain that. By a single sale I mean could you dump all of these lots on the market at the same time and sell all of them for cash, we will say, within a period of one week?

The WITNESS: No, sir, not in my opinion.

Mr. NEALON: I object to that, if your Honor please. This is something——

The REFEREE: That is an improper question. That does not relate to any situation that would appear to arise in this case.

(Testimony of George E. Lilley.)

Mr. MACKAY: To sell these lots to separate purchasers in your opinion would require a considerable period of time, would it not?

The WITNESS: Yes, it would.

Mr. MACKAY: Unless they were to be sacrificed at a very low price?

The WITNESS: Yes, sir.

Mr. MACKAY: Suppose you were to dump these lots on the market, do you think that purchasers for all of them could be obtained at such prices as would aggregate as high as sixty or seventy thousand dollars, unless a more or less intensive sales campaign and advertising campaign was carried on?

The WITNESS: Well, I don't think they could be sold quickly at any price under the present market conditions.

Mr. MACKAY: Under the present market conditions how long do you think it would take you to sell enough lots [700] out there to aggregate as much as sixty or seventy thousand dollars?

Mr. NEALON: That is assuming, of course, that the present market conditions continue?

Mr. MACKAY: Yes.

Mr. NEALON: It is calling for something only the God above knows, so I don't think it is a proper question, if your Honor please. The witness cannot guess at what the values may be by the time a sale could be made as a judicial sale.

Mr. MACKAY: Of course, they might get worse instead of better.

(Testimony of George E. Lilley.)

The WITNESS: Well, I would not like to make a guess. That is a pretty wild guess to make. I would prefer not to make one upon that.

Mr. MACKAY: In your opinion it would take some considerable time, Mr. Lilley?

The WITNESS: Yes, it would.

Mr. MACKAY: A good many months?

(There was no answer.)

The WITNESS: Are you waiting?

Mr. MACKAY: My question was not very much of an interrogatory. I said, 'A good many months.'

Mr. MACKAY: You feel it would take a good many months to sell this property out and realize as much as sixty or seven thousand dollars, do you not?

The WITNESS: Under the present market conditions it would take a good many months to sell it at an aggregate of sixty or seventy thousand dollars, yes.''

Cross-Examination by Mr. Nealon

Our firm handles a great many mortgage loans and [701] we come in contact with people defaulting on their interest because of the present financial situation. At the present time, due largely to the depression, we do not accelerate mortgages and foreclose immediately. We do not feel that we are losing our security by being lenient and not compelling a strict adherence to the terms of the mortgages. I have not made calculation as to the value of this tract as a whole, based upon sales that have taken place there the last year that I know of within

(Testimony of George E. Lilley.)

my own knowledge, but I can make it very shortly because I have been the trustee in bankruptcy. There are approximately 200 lots in these proceedings. The average sales there have been right at $600, and based upon that, the value of the whole would be $120,000.

Redirect Examination by Mr. Mackay

The sales to which I have referred have been for cash. There have been ten or eleven sales made since I have been trustee.

"Mr. MACKAY: At that rate it would take about twenty years to clean out the tract, would it not?

The WITNESS: Just about."

Recross Examination by Mr. Nealon

No applications for sales were made until last May and only a few lots were offered for sale at that time. When I answered Mr. Mackay's question in which he suggested it would take twenty years to sell out this tract on that basis, I was answering his question as I understood it, that at the rate of ten lots per year it would take that long to sell 200 lots. In my opinion it would not take twenty years to sell [702] the lots. There is no reason why, under normal conditions, this tract could not be sold. It is a beautifully located tract and well improved. It could be sold as readily as any other tract, I think. It is a well paved tract. The streets that are paved are Orange Drive, North Windsor Drive, and Windsor Boulevard and Windsor Drive was paved. Arden Street, I would say is 80 per cent paved, and

(Testimony of George E. Lilley.)

the same of Kennemore. There is county paving on Seventh Street, and Camelback Road is county paving. Inside the tract the paving is macadam and bitulithic paving, about five inches I think. The paving on Camelback Road is concrete and that on Seventh Street and Central Avenue is concrete paving.

Redirect Examination by Mr. Mackay

"Mr. MACKAY: Mr. Lilley, you several months ago procured from this court an order authorizing you to sell this property free and clear of any liens, did you not?

Mr. NEALON: I object to that. The record is the best evidence as to that.

The REFEREE: The record is here upon that.

Mr. MACKAY: I would like to have the court rule upon the objection, please.

The REFEREE: That is objectionable. The record is here.

Mr. MACKAY: I wish to have the ruling. I wish to ask the question and have it in the record. It is explanatory, I admit, but it is in the form I wish to put it.

(There was no ruling by the Referee.)

The WITNESS: Yes, I think there was such an order made. [703]

Mr. MACKAY: Now, have you attempted to make a sale under any such order?

Mr. NEALON: I object to that, if your Honor please. In these proceedings the pleadings filed herein show that the purpose of this hearing is to

(Testimony of George E. Lilley.)

ascertain these liens—or asserted liens, so a sale could be made free and clear of liens. I further object to it on the ground that the record here shows that the respondent, Margaret B. Barringer, came into court and objected to the sale of these lots until her lien was—until her lien, as she called it, was established, so that she might bid up on these lots, and I avow that the record shows that.

The REFEREE: Objection sustained.

Mr. MACKAY: An exception.

You may answer, Mr. Lilley.

The WITNESS: No, there has been no effort to make a sale of the lots that we term the Barringer lots until the claim has been proven." [704]

R. J. NUNNELEY

called as a witness for Respondent Barringer testified as follows:

I have been engaged in the real estate business in Phoenix for nineteen years. I am familiar with the prices at which land in Phoenix and vicinity has from time to time been sold. I am familiar with the subdivision Windsor Square. I went through it within the last month or two (190). In my opinion the lots in Windsor Square, exclusive of lots occupied by houses, are worth about $75,000 (192). I believe they could be sold en masse for that price (193).

(Testimony of R. J. Nunneley.)

Cross Examination by Mr. Nealon

I have no prospective purchaser in mind to bid for any part of this property, but I might be able to get one. I do not regard the recent sales made this Spring for cash within Windsor Square as a fair indication of market value. I think the sales may have had some reasons for them (194) even though they were for cash paid into the court. To some extent I considered those sales in fixing the market value. I took into consideration the quality and character of the pavement in this subdivision and also the sidewalks and the water system. In reaching my valuation of $75,000 I figured that would be what anybody who had that much money would pay for them as an entirety. I reached that conclusion on what might happen in the next few years from a speculation point of view. I took into consideration there was some possible demand for lots there, and, of course, a few sales have been made. I estimated there were about 200 lots (195). I arrived at the value of $75,000 by figuring [705] they would be worth that from a farming stand point of view if the lots did not sell. I am somewhat familiar with the plot of Windsor Square. Referring to trustee's exhibit "A" for identification (map), I would value Lot 14 in Block 1 at around $150; Lot 40 in Block 2 around $350; Lot 1 in Block 3 around $350; Lot 38 in Block 8 around $400; Lot 10 in Block 5 around $200; Lot 14 in

(Testimony of R. J. Nunneley.)

Block 8 around $200; Lot 21 in Block 8 around $400; and Lot 9 in Block 9 around $200. I do not know, nor have I heard, of any sales within Windsor Square at the values I have placed thereon (196). In fixing my valuations, I have considered the pavement in front of the lots that are paved, the waterworks system, the sidewalks, and other improvements shown. I would not promise that I could obtain more than those prices for a client of mine. I based my valuation on the fact that I have a few lots in the city of Phoenix that are being offered for considerably less than they could be bought at one time. That is one of my reasons for my opinion (197). I know of no sales of lots in this vicinity. I have never sold any lots in Windsor Square. I have never put on a subdivision. I have taken into consideration the fact that the paving in front of these lots is all paid for. I am not qualified to estimate the cost of paving, of the character that is in this subdivision, on a 67-foot lot. In basing my opinion, I guessed it around $250. I think I would be willing to furnish somebody who would probably buy it at the price at which I have valued it (198). That has something to do with what I am basing my valuation on (199), but it is not the sole basis of my opinion (200). It is based on nineteen years' knowledge of property in this vicinity. Having negotiated and sold considerable property in the vicinity, I know the property could have been bought for $75,000 prior to the time of the development

(Testimony of R. J. Nunneley.)

(200). I also know [706] it was sold for $105,000. I understand more than $60,000 in improvements were placed upon it after it was purchased. I understand $100,000 has been spent on the property outside of the buildings. Some of the boys told me that. While the purchase price was $105,000, there is a big difference between a cash transaction and a term transaction. I understand the sale was of the latter characer (201).

Redirect Examination by Mr. Mackay

In placing $75,000 as the highest value of Windsor Square, I have not taken into consideration the lots occupied by buildings at the present time. I have not figured the value of every lot. In arriving at my valuation of $75,000, I had in mind all of the lots in the subdivision with the exception of eight or nine lots which have houses upon them (203).

Recross Examination by Mr. Nealon

I have only driven through this property sometimes and I have never spent a great number of days examining it. I do not know what streets are paved.

WM. H. MACKAY

called as a witness for Respondent Barringer testified as follows:

I am a member of a firm of attorneys known as Ellinwood & Ross. In September, 1930, that firm

(Testimony of Wm. H. Mackay.)

was retained by Respondent Barringer for the purpose of foreclosing her lien under the Declaration of Trust which has been introduced as Respondent Barringer's Exhibit No. 2. We spent considerable time in September and October examining the instruments, plats, records and accounts in the custody of the Trustee under the Declaration of Trust and in examining law and authorities in connection with the contemplated foreclosure. During that period we had various interviews with officers of Phoenix Title & [707] Trust Company, Mrs. Barringer's son, Mr. Bennitt, Mr. Owens, and others. All of this work, up to the end of October, involved about fifty hours. From that period until the 17th of April we spent about eighty-four hours chiefly in interviews with Mr. Nealon, the Trustee's attorney, Mr. Bennitt, Mr. Owens and officers of the Title Company in connection with the proposed sale of this property for the purpose of satisfying Mrs. Barringer's lien. It appeared for a while that by stipulation a sale could be had under certain agreements and conditions, with a view to devoting the proceeds, or such portion thereof as was necessary, to the extinguishment of Mrs. Barringer's lien. On or about April 17, 1931, such a stipulation was presented to the Referee, who refused to confirm the Trustee's execution of the stipulation.

From April 17th, 1931, until date, our firm has devoted eighty-one hours to an examination of the issues involved in this controversy. We have appeared at least once, or perhaps two or three times,

(Testimony of Wm. H. Mackay.)
before the Referee to resist the granting of Trustee's petition for an order of sale.

Cross Examination by Mr. Nealon

The matter of the collection for Mrs. Barringer was first placed in our office to the best of my recollection by Mrs. Barringer's son in September, 1930. He at that time requested us to proceed to foreclose her lien under the declaration of trust. Prior to the date of adjudication in bankruptcy, which was October 25th of that year, we were furnished a voluminous file which I think was placed in our hands by Mr. Bennitt. We spent considerable time, first in examining the provisions of the declaration of trust. We secured from the Phoenix Title and Trust Company a statement [708] of the account between the beneficiary and the payee, statements of lots which had not been released, and we checked with Mr. Bennett the same matters he had in his possession, records of the same nature, or copies of them. I have forgotten which we took up first, the records in the Trustee's office or whether we first took the matter up with Mr. Bennitt. We also went into the question of the interest of the corporation which was then operating a utility in connection with the subdivision. It was called the Windsor Square Improvement Company. We looked up more or less law, had numerous interviews with Mr. Owens, who at that time was remonstrating with us to withhold the foreclosure proceedings, he having come to our office on numerous occasions with

(Testimony of Wm. H. Mackay.)

proposals which contemplated an extension of time within which the covenants of the beneficiary could be performed. We gave considerable attention to Mr. Owens' proposals, but failed to come to any satisfactory compromise and he then stated if we went ahead with the foreclosure suit, he would throw the entire project into bankruptcy. We took no action as to the Windsor Square Improvement Company. Subsequently, after several conferences with yourself (Mr. Nealon), it was determined that the claim, if any existed on behalf of the Windsor Square Improvement Company, should be presented under an order to show cause, and I think that company failed to answer the order to show cause and it was adjudged that it had no interest in the property. I suppose that appears of record in the proceedings. That action was brought by the Trustee in Bankruptcy. We spent some time in conferring with the Trustee's attorney on the procedure to be followed. We don't claim any credit for it at all. The reason we didn't foreclose the declaration of trust prior to bankruptcy was that we were too rushed in the office at the [709] time—in the short period that you mention—to satisfy ourselves as to all of the legal problems involved and to prepare the necessary pleadings, although I might say that I did prepare a draft of a complaint. We were also deterred from pressing the matter very vigorously because of the fact that Mr. Owens was calling at the office frequently and mak-

(Testimony of Wm. H. Mackay.)

ing proposals which were not entirely unsatisfactory, and it appeared for a while that we might not foreclose for some time. It developed after half a dozen or more of these conferences that we would be unable to come to a satisfactory settlement of the matter. Mr. Owens made it clear to us that he was going to go into bankruptcy or in some manner throw this scheme into bankruptcy, and having had some limited experience in such matters, I felt if we commenced foreclosure suit, that those proceedings would be enjoined promptly by the Trustee in Bankruptcy and there would be much ado about nothing. I can't remember at which time Mr. Owens notified us that he would probably go into bankruptcy. I should say that it probably was some time before the middle of October. It was after we had been negotiating with him for some time. The fee we are asking is under the provisions of the declaration of trust, and not for any services to the estate in bankruptcy.

Cross Examination by Mr. Gust

We are asking for an attorneys' fee under the provisions of Tunney's note as well as those of the Declaration of Trust (206-214). [710]

CHARLES B. WARD

called as a witness for Respondent Barringer testified as follows:

I am an attorney.

The qualifications of the witness to testify concerning value of legal services was admitted by counsel.

"Mr. MACKAY: I would like to ask you a hypothetical question, so that I may get from you your opinion as to what a reasonable attorney's fee would be in such a transaction. The hypothetical transaction is as follows: A retains the services of attorneys in connection with the following transaction: A conveys a large tract of real estate to B, who executes a declaration of trust acknowledging that it holds title in trust to secure payment of the note given by C to A in the principal sum of $85,000. According to the terms of the declaration of trust it is contemplated that C will subdivide the premises, will proceed to sell lots, and will apply the proceeds, or certain portions thereof, to the payment of the $85,000 note, it being provided that the Trustee will release several lots when and as C makes certain payments on the note as per a schedule of lot-release prices attached to the declaration of trust, the general line-up being in accordance with the usual plan of sales campaigns in subdivision tracts. C assigns his interest to X, who defaults in payment of interest on the note. A's attorneys examine the declaration of trust and the

(Testimony of Charles B. Ward.)

records in B's office and prepare to commence a foreclosure suit when X voluntarily goes into bankruptcy. X's Trustee in Bankruptcy petitions the Court for an order authorizing the sale of the premises free of A's lien. Her attorneys appear in court and resist such petition on the ground that no sale can be lawfully had until the amount of her claim is adjudicated. Eventually an order of sale [711] permitting the premises to be sold after such adjudication and permitting A after such adjudication to bid thereat is made. X as trustee in bankruptcy then files a petition alleging that A's lien under the declaration of trust is void because the declaration of trust was not recorded. A's attorneys file in the bankruptcy court a petition in intervention setting up A's lien and requesting that A's lien be adjudged valid. Before doing this, A's attorneys devote——

The WITNESS: Wait a minute. A is always your client? I am trying to keep it in mind.

Mr. MACKAY: Yes.

The WITNESS: A is always your client. I see.

Mr. MACKAY: Yes, A is the petitioner in intervention, and X is the assignee. Before filing this petition in intervention A's attorneys devote considerable time in examining the authorities on the question of the necessity of recording such a declaration of trust in order to preserve A's lien thereunder; also considerable time in examining the dec-

(Testimony of Charles B. Ward.)

laration of trust, the records, instruments, assignments, statements of account, all in the office of B, the trustee; spend considerable time looking into the authorities to ascertain the proper procedure. to protect and enforce A's lien, in interviewing various witnesses, with a view to presenting A's case in the bankruptcy court; and A's attorneys also devote several days to the giving of testimony before the referee in bankruptcy. Assuming that A's attorneys are successful in defeating the claim of the trustee in bankruptcy that the lien is invalid, and that as a result of their services a sale is had either for the purpose of satisfying A's lien or a sale is had under an order transferring A's lien to the proceeds of any such sale, and that it appears in such an action that the amount of A's lien is an indebtedness in [712] the principal amount of some $69.000. What in your opinion would be the reasonable value of the services of her attorneys as I have outlined them to you?

The WITNESS: Assuming that A's attorneys are going ahead, proceeding with the enforcement of whatever right their client has, assuming it is necessary to be done?

Mr. MACKAY: And assuming that they succeed.

The WITNESS: I thought that was in there; I didn't——

Mr. MACKAY: Yes, that was there.

(Testimony of Charles B. Ward.)

"Mr. NEALON: We object to that testimony, first, upon the general grounds heretofore made to testimony in regard to conditions and under the alleged declaration of trust; and secondly, on the ground that the hypothetical question is improper in form and substance, in that it does not separate the services claimed to have been rendered prior to bankruptcy and the services rendered subsequent to bankruptcy, nor does not separate what is done merely for the benefit of A and that which may be done for the benefit of the estate in bankruptcy; third, that it assumes many facts not in evidence and omits many facts that are in evidence; next, that it supplies as a matter of conjecture what may take place in the future, and which may never take place, namely, that counsel for A may be successful in defeating the claim of the trustee in bankruptcy that this lien is invalid.

The REFEREE: The objection is sustained, and the question may be answered under the rules.

Mr. MACKAY: And I will note an exception.

The WITNESS: I will say from the facts stated in the hypothetical question that a fair and reasonable value would be ten per cent upon the amount found, the amount owing, if the lien was to be foreclosed in that amount, or to be protected in that amount." [713]

Cross-Examination

By Mr. NEALON.

Regardless of the provisions in the contract limiting the recovery to five per cent, I would think the

(Testimony of Charles B. Ward.)

reasonable value of the services would be there, although they might contract for a great deal more or a great deal less; but answering the hypothetical question as to the reasonable value, I would say ten per cent.

"Mr. NEALON: Yes, Now, Mr. Ward, from the question asked of you, can you separate and give the reasonable value of the services prior to October 27, 1930, the testimony showing that the matter was placed in the hands of counsel in September of that year?

Mr. MACKAY: May I interrupt you, Mr. Nealon, to state that the witness was merely examined on the hypothetical question and not on the basis of testimony which he may have heard in court here?

Mr. NEALON: Well, on cross-examination I think I have got a right to ask that question, if he can from the question answer that.

The WITNESS: Well, I would say, Judge, I sat there and heard this gentleman here speaking about what was done before. May I take that into consideration in that question?

Mr. NEALON: On my cross-examination?

The WITNESS: Yes.

Mr. NEALON: Yes, you may take into consideration all that you have heard testified to in the court room.

The WITNESS: Well, as I listened to him there, if a person brings to me a suit in that sum, a

(Testimony of Charles B. Ward.)

great many thousands of dollars, I look first to the responsibility; second, when I found that there was a declaration of trust instead of a [714] mortgage, and if I found also that that declaration of trust had not been recorded, I would feel right away that it required—that there was questions involved there that required a lawyer to get his nose in the law books and just stay there, time to determine what—I have drawn some several declarations of trust, and they are long and involved, to the point, and all; and if I was charging a fee, I would figure to charge my client—if Mrs. Barringer was my client, if that is her name, I would have said right there, 'I want $5,000 for it' right there without a step, if I had to determine all those things. He says there is a declaration of trust, and as I heard his testimony back there, it was a declaration of trust providing a lien instead of a mortgage providing a lien, just a common mortgage. I heard him also say that there was some questions raised about that declaration of trust not being recorded. I would have to determine right away what that bound and whom it bound and whether I was bound by it as against creditors, and all that kind of thing. In other words, I would have to get my nose searching authorities; and I suppose Mr. MacKay and Ellinwood and Ross, who are better lawyers than I am, would get right in tip-top, head-over-heels into that right away, I know I would, and I think any other lawyer would.

(Testimony of Charles B. Ward.)

And I would say that the amount involved, I would hate to look into a case like that—I would say that the reasonable value of the services of that case to get right into it and assume the responsibility, would be at least $5,000 before he gets into this other.

Now, I wouldn't want to say that the balance over $5,000 would be paid for the services done after that, but I was taking the whole based upon the hypothetical question that I arrived at ten per cent on. We have a theory of about ten per cent on such matters. [715]

Mr. NEALON: But from the testimony you heard in court what would you testify as to the value of the services rendered by Mr. MacKay and Ellinwood and Ross prior to October the 27th, 1930?

The WITNESS: Yes, assuming that this came into their office and these questions were before them?

Mr. NEALON: Yes. No, just confine your answer, Mr. Ward, to that.

The WITNESS: Yes. I said $5,000.

Mr. NEALON: $5,000?

The WITNESS: Yes.

Mr. NEALON: Now, can you from the evidence in court form a value as to the services that were rendered by the counsel with benefit to the bankrupt estate?

The WITNESS: No.

(Testimony of Charles B. Ward.)

The WITNESS resuming: I haven't based my opinion on what would be the value of the services to the estate. I have based it upon the question that even if you split the services, what the reasonable value of them are."

BLAINE B. SHIMMEL

called as a witness for Respondent Barringer, testified as follows:

I am a member of the law firm of Moore and Shimmel.

Mr. Shimmel's qualifications to testify as an expert were admitted by counsel for trustee in bankruptcy.

I am generally familiar with the fees charged for services in foreclosure suits. I was present in court and heard the hypothetical question which was put to Mr. Ward. I followed it pretty carefully and I think I comprehend it in a general way. [716]

"Mr. MACKAY: What would you say, Mr. Shimmel, as to the value of the services outlined in the hypothetical question which was put to Mr. Ward?"

Which question was objected to by the trustee in banrkuptcy for the reasons given in the objections to the same question in Mr. Ward's testimony, which objection was sustained by the Referee and an exception saved by Respondent Barringer.

(Testimony of Blaine B. Shimmel.)

"The WITNESS: I would say that the minimum compensation, reasonable compensation for the services rendered in your hypothetical question would be approximately sixty-nine hundred or seven thousand dollars, being about ten per cent of the amount of the recovery, which I understood was $69,000 principal."

Cross-Examination

by Mr. NEALON.

I am basing my answer on the services rendered as a whole. I don't know to whom the benefit is going to accrue, whether it will accrue to anyone or not. I am not considering any special rules in bankruptcy governing the allowance of fees, as I don't know anything about that. I would say on the abstract proposition upon the facts as contained in that question that would be my idea of the reasonable value of those services. The hypothetical question does not differentiate or name any clients. I am taking the value of the services in a legal proceeding. I wouldn't say that the services were worth any less if the litigation was unsuccessful. I did not take into consideration the nature of the results that might have been obtained in bankruptcy proceedings as differentiated from proceedings in the state court or in the federal court.

(Testimony of Blaine B. Shimmel.)

Thereupon, there was received in evidence (235) as

RESPONDENT BARRINGER'S EXHIBIT No. 9

an assignment executed and acknowledged by Thos. J. Tunney on January 12th, 1929. By its terms, in consideration of $1.00 [717] and other valuable considerations, Thos. J. Tunney assigned to L. D. Owens, Jr., husband of Mary Margaret Owens, an undivided 5/6 interest, to H. C. Dinmore, husband of Estelle Dinmore, an undivided 1/8 interest, and to S. W. Mills, husband of Dorothy Mills, an undivided 1/24 interest, respectively, of the assignors' rights in and to the Declaration of Trust (Respondent Barringer's Exhibit No. 2) and in and to the real property therein described. Endorsed on said exhibit is a statement, subscribed by L. D. Owens, Jr., H. C. Dinmore and S. W. Mills, to the effect that each of them accepts the foregoing assignment and ratifies, confirms and approves the Declaration of Trust referred to therein. A further statement, that it accepts the foregoing assignment, is subscribed to by Phoenix Title and Trust Company.

Thereupon, there was received in evidence (236), a written assignment dated June 4th, 1930, as

RESPONDENT BARRINGER'S EXHIBIT No. 10

Said exhibit is a written assignment entitled "Assignment of Beneficial Interest", executed on June

(Testimony of Blaine B. Shimmel.)

4th, 1930, and acknowledged on June 5th, 1930, by L. D. Owens, Jr., Mary Margaret Owens, his wife, H. C. Dinmore, Estelle Dinmore, his wife, S. W. Mills and Dorothy Mills, his wife, as assignors, and by its terms, for a consideration of $10 and other valuable considerations, assigns to Windsor Square Development, Inc., all of the assignors' rights in and to the Declaration of Trust (Respondent Barringer's Exhibit No. 2), and in and to the real property described as Windsor Square; subject, however, to all of the terms and conditions of said Declaration of Trust, and a collateral assignment in favor of Phoenix Savings Bank & Trust Company given to secure the sum of $26,500, and subject further [718] to all of the liabilities and obligations of the assignors in connection with said trust or said property. Endorsed on said assignment is the assignees' acceptance thereof executed by Gene S. Cunningham, its President, under date of June 4th, 1930. Also endorsed on said assignment is the acceptance thereof of Phoenix Title and Trust Company.

Thereupon, there was received in evidence (237), a written assignment dated October 24th, 1930 (237) as

RESPONDENT BARRINGER'S EXHIBIT NO. 11.

Said exhibit is a written assignment entitled "Assignment", executed and acknowledged on Octo-

(Testimony of Blaine B. Shimmel.)

ber 24th, 1930, by Windsor Square Development, Inc. by Gene S. Cunningham, its President, as assignor, and by its terms, for a consideration of $10 and other valuable considerations, assigns to L. D. Owens, Jr., all of the assignor's right, powers, privileges and benefits created and reserved by the Declaration of Trust (Respondent Barringer's Exhibit No. 2), and in and to the real property described as Windsor Square; subject, however, to all of the terms and conditions of said Declaration of Trust and a collateral assignment in favor of Phoenix Savings Bank & Trust Company given to secure the sum of $26,500, and subject further to all of the liabilities and obligations of the assignor in connection with said trust or said property. Endorsed on said assignment is the assignee's acceptance thereof executed by L. D. Owens, under date of October 24th, 1930. Also endorsed on said assignment is the acceptance thereof of Phoenix Title and Trust Company. Annexed to, and a part of said exhibit, are the original minutes of a special meeting of the Directors of Windsor Square Development, Inc., which are in words and figures as follows, to-wit: [719]

"MINUTES OF SPECIAL MEETING OF DIRECTORS OF WINDSOR SQUARE DEVELOPMENT, INC.

Held at 415 Ellis Building, in Phoenix, Arizona, October 24th, 1930.

(Testimony of Blaine B. Shimmel.)

There were present Gene S. Cuningham, Charles A. Carson, Jr. and Margaret Richardson. Thereupon the secretary announced that all directors, members of this board, were present in person and the president of the corporation acting as chairman of this meeting, called the meeting to order.

Thereupon the chair announced to the meeting that in as much as L. D. Owens, Jr. is the party in interest, acting for himself and H. C. Dinmore and S. W. Mills, it is the purpose of this meeting to so handle the assets and affairs of this corporation as to fully, fairly, completely and finally set the same over to the said L. D. Owens, Jr. and that since all of the assets of this corporation consist of its equity in and to that certain beneficial interest created and reserved by a certain declaration of trust lodged in the office of Phoenix Title and Trust Company at Phoenix, Arizona, under its trust No. 418, dated January 9, 1929, concerning Windsor Square Development, Inc. according to the map of said Windsor Square on file and of record in the office of the County Recorder of Maricopa County, Arizona, and that all of said asset is comprised of such beneficial interest, amounting to neither real property in esse, nor personal property capable of manual delivery, that the same should be transferred by it to said L. D. Owens, Jr. by an indenture of assignment.

(Testimony of Blaine B. Shimmel.)

Thereupon discussion was had and upon motion made by director Carson, seconded by director Richardson, and thereafter unanimously carried, the following resolution was adopted:

RESOLVED: That this corporation by and through its president and secretary immediately make, execute and deliver to L. D. Owens, Jr. its written assignment of beneficial interest in and to that certain agreement of declaration of trust in the Phoenix Title and Trust Company, numbered therein trust No. 418, and thereby transfer to the said L. D. Owens, Jr. all right, title and interest it may now have, or hereafter claim to have in and to said property.

There being no further business to come before said meeting, upon motion duly made, seconded and carried, said meeting adjourned.

Margaret Richardson,
Secretary."

Thereupon, there was received in evidence a written assignment dated October 25th, 1930, as [720]

RESPONDENT BARRINGER'S EXHIBIT No. 12.

Said exhibit is in words and figures as follows, to-wit: (237).

"ASSIGNMENT OF BENEFICIAL INTEREST
TRUST No. 418

KNOW ALL MEN BY THESE PRESENTS: That LEN D. OWENS, JR., sometimes known as L. D. Owens, and Mary Margaret Owens, his wife, par-

(Testimony of Blaine B. Shimmel.)

ties of the first part, assignors, for and in consideration of the sum of TEN DOLLARS ($10.00) and other good and valuable consideration to them in hand paid, receipt whereof is hereby acknowledged, do by these presents convey, sell, assign, transfer and set over unto WINDSOR SQUARE DEVELOPMENT, INC., an Arizona corporation, party of the second party, Assignee, their rights, powers, privileges and benefits created or reserved by that certain Declaration of Trust issued by Phoenix Title and Trust Company under its Trust No. 418, dated January 9, 1929, insofar as the same affects the following described property and in and to the following described property in the County of Maricopa, State of Arizona, to-wit: All of WINDSOR SQUARE according to the map or plat thereof on file and of record in the office of the County Recorder of Maricopa County, Arizona, in Book 20 of Maps, page 37 thereof, EXCEPT the following described lots, to-wit: Lots 1, 14, 15, 17 and 20, Block 1; Lots 1, 25, 35, 37 and 40, Block 2; Lots 1, 21, 31 and 38, Block 3; Lots 1, 4, 5, 6, 10, 18, 22 and 23, Block 4; Lots 1, 2, 4, 10, 12, 20 and 21, Block 5; Lots 4 and 11, Block 6; Lots 24, 28 and 30, Block 7; Lots 14, 16, 21, 24, 25, 26, 27, 29, 31 and 45, Block 8; Lots 2, 9, 23, 24, 25, 26 and 27, Block 9, all in Windsor Square, which hereto have been collaterally assigned to the Phoenix Savings Bank and Trust Company to secure the payment of

(Testimony of Blaine B. Shimmel.)

the sum of Twenty Six Thousand Five Hundred Dollars ($26,500.00) and which were subsequently absolutely assigned [721] under date of October 24, 1930 to L. D. Owens, Sr., husband of Isabel Owens;

SUBJECT, however, to all sales agreements or contracts for sale to purchasers of Lots in said Windsor Square; subject to the payment of all the costs, fees, charges and expenses of Phoenix Title and Trust Company as Trustee in connection with said Trust; subject to all deeds, assignments and grants heretofore executed by Phoenix Title and Trust Company as Trustee; subject to the terms and conditions of the aforementioned Declaration of Trust and all modifications thereof; subject to all of the liabilities and obligations of the parties of the first part herein in connection with said Trust or the said property; and subject further to all orders or instructions heretofore given to Phoenix Title and Trust Company as Trustee in connection with the handling of said Trust or trust property.

It is understood and agreed that the title to the above described property is vested in the Phoenix Title and Trust Company, Trustee, and that the right, title and interest of the Assignors hereby assigned is a part of the interest of beneficiaries under Trust No. 418 of the Phoenix Title and Trust Company, under which Trust said lots are held.

It is the intention of this Assignment that all of the interests of the said parties of the first part in and to the said property shall be assigned to the

(Testimony of Blaine B. Shimmel.)

party of the second part and that all of the obligations and liabilities of the said parties of the first part in connection with said Trust, insofar as the foregoing described property is concerned, shall be assumed by the party of the second part, but that the rights and powers of the Phoenix Title and Trust Company or Phoenix Title and Trust Company, Trustee, shall not be affected thereby. [722]

The said Phoenix Title and Trust Company is hereby directed to recognize this Assignment and to substitute WINDSOR SQUARE DEVELOPMENT, INC., as the successor in interest of the said parties of the first part insofar as the above described property is concerned only.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands this 25th day of October, A. D. 1930.

LEN D. OWENS, JR.
L. D. OWENS, JR.
MARY MARGARET OWENS
By LEN D. OWENS, JR.
Her Attorney in Fact."

Said instrument is duly acknowledged by L. D. Owens, Jr., individually and as Attorney-in-Fact for Mary Margaret Owens. Endorsed thereon is the statement of Windsor Square Development, Inc., executed by John Koester, as President, and attested by L. D. Owens, Jr., as Secretary, accepting the foregoing assignment and approving the terms

(Testimony of Blaine B. Shimmel.)

and conditions thereof. There is also endrosed thereon the acceptance of Phoenix Title and Trust Company of the foregoing assignment. Annexed to said exhibit are the minutes of a special meeting of the Directors of Windsor Square Development, Inc., held on October 25th, 1930. Said minutes are in words and figures as follows, to-wit:

"MINUTES OF SPECIAL MEETING OF BOARD OF DIRECTORS OF WINDSOR SQUARE DEVELOPMENT, INC.

A special meeting of the board of directors of Windsor Square Development, Inc. was held at room 321 Fleming Building, Phoenix, Arizona on the 25th day of October, 1930 at the hour of .....

[723]

The written resignation of Mary Margaret Owens was read and upon motion duly made and seconded, her resignation was accepted.

John Koester, of Phoenix, Arizona was duly nominated and elected to the office of the President and director of the company to fill the vacancy caused by the resignation of Mary Margaret Owens.

Mr. Koester was called into the meeting and accepted the office to which he had been elected.

Thereafter the written resignation of Edgar E. Butler as director and vice-president of the company was read and upon motion made and seconded, his resignation was accepted.

Thereafter it was stated that the resignation of Mary Margaret Owens had been tendered for the

(Testimony of Blaine B. Shimmel.)

purpose only, of making it possible for a quorum to be present at the meeting to accept the resignation of Edgar E. Butler, and it was moved, seconded and carried, that she be named vice-president and director of the company to fill the vacancy caused by the resignation of Edgar E. Butler. It was also moved, seconded and carried that an assignment by L. D. and Mary Margaret Owens to the company of their interest in and to Windsor Square, be accepted by the company.

Len D. Owens, Jr.
Edgar E. Butler
John Koester"

GENE S. CUNNINGHAM

called as a witness for Respondent Barringer testified as follows:

I am an attorney practicing in Phoenix. I was one [724] of the incorporators of Windsor Square Development, Inc. and performed the legal services in organizing that company (237). I was the President and a director of said company until October 24, 1930. Respondent Barringer's Exhibit No. 11 bears my signature as President. I was the attorney of said corporation from the time of its incorporation until the date of that assignment (Respondent Barringer's Exhibit No. 11) (238). From

(Testimony of Gene S. Cunningham.)

the date of its incorporation until October 24th, 1930, Windsor Square Development, Inc. transacted no business other than to take an assignment (Respondent Barringer's Exhibit No. 10) from Owens, Dinmore and Mills and, later, to divest itself of such assignment (239). No consideration was paid by Windsor Square Development, Inc. for the assignment which is marked Respondent Barringer's Exhibit No. 10. No activities were performed by the assignee under that assignment except, subsequently, to make the reassignment to Owens (240). On accepting the assignment (Respondent Barringer's Exhibit No. 10) Windsor Square Development, Inc. did not enter into any agreement, written or oral, under which it agreed to perform any acts in connection with Windsor Square. Windsor Square Development, Inc. received no consideration for its assignment (Respondent Barringer's Exhibit No. 11) to L. D. Owens, Jr. other than the assurance of Owens that he would take over the corporate structure of Windsor Square Development, Inc., accept the resignation of its present officers, and supplant them with others. The Articles of Incorporation, receipts for fees paid the Corporation Commission and the County Recorder, minutes of the directors' meetings and resignations of the then officers were turned over to Mr. Owens. The minutes referred to (241) were of the meeting of the directors at which

(Testimony of Gene S. Cunningham.)

the assignment [725] to L. D. Owens (Respondent Barringer's Exhibit No. 11) was authorized. Up to and including October 24th, 1930, Windsor Square Development, Inc. had never transacted any business save and except to receive the assignment (Respondent Barringer's Exhibit No. 10) and it had never incurred any indebtedness (242).

Cross-Examination

By Mr. NEALON.

Prior to October 25th, 1930, Windsor Square Development, Inc. had never assumed or contracted for the payment of any moneys other than organization expenses (242) which was not an indebtedness of the corporation. I owned no stock in the company. It was contemplated that the corporation would issue stock on receipt of the assignment (Respondent Barringer's Exhibit No. 10). A financing scheme was contemplated which involved the issuance of stock to Owens, Dinmore and Mills (243), who would receive a very large portion of the stock.

"Mr. NEALON: Now, when you spoke of their not contracting any debts you did not mean by that to exclude any liability that they might have incurred by taking over this property, did you?

The WITNESS: Oh, no. Whatever went with the assignment, of course, came with the assignment. They contracted no new indebtedness, no organization nor any running accounts—that is what

(Testimony of Gene S. Cunningham.)

I mean—aside from whatever might have come with the assignment.

Mr. NEALON: And you are confining that to the mere period when you were an officer of the corporation?

The WITNESS: Exactly."

Re-direct Examination

By Mr. MACKAY:

Prior to October 25th, 1930, no stock whatever was issued by Windsor Square Development, Inc. [726]

"Mr. MACKAY: On accepting the assignment from Owens, Dinmore, and Mills did that corporation through its Board of Directors or officers in any way assume any indebtedness by express agreement of the assignors?

The WITNESS: No, other than would have (244) come, as I stated a minute ago, with the assignment; no executed agreement assumed. This was all in the formative stage. It was all prospective, this entire corporation. No business was transacted under it. It was a program, and never was completed—the corporation completed, but the thing that the corporation was to do was never completed. In other words, the financing program was never carried out.

Mr. MACKAY: And did that corporation at any time claim any real interest by virtue of any assignment?

(Testimony of Gene S. Cunningham.)

The WITNESS: No, other than as the corporation represented and acted for Owens, Dinmore, and those persons, because the other persons contemplating entering the corporation quit their thought of putting up money to finance it; so the corporation itself, as such, other than as a representative of Owens, Dinmore, and Mills didn't claim anything.

Mr. MACKAY: In other words, you had a program which contemplated certain financing to be done by the corporation, which financing was never done or never undertaken to be done, and the assignment was a mere naked one and part of an uncompleted transaction? Is that right? (245)

The WITNESS: Yes, it was.

Mr. MACKAY: And when the property was transferred by the corporation, of which you were then an officer or director, it made no claim to compensation for such assignment?

The WITNESS: None. [727]

Mr. MACKAY: It was a mere naked assignment to it and a naked assignment back to Owens by it?

The WITNESS: That is it.

Mr. MACKAY: That is all?

The WITNESS: Except, as I say, the value of a promise that was then carried out that the then officers should be divested of any connection with this corporation."

(Testimony of Gene S. Cunningham.)

Re-Cross-Examination

By Mr. NEALON.

I think I filed the articles of incorporation. I do not remember the capitalization. Part of the capital was to be paid in lands of Owens and Dinmore (246). The articles of incorporation stated that the capital might so be paid.

"Mr. NEALON: Now, you said no stock was mentioned. You meant no certificates of stock?

The WITNESS: No actual certificates.

Mr. NEALON: Yes. You didn't mean to say that Owens and Dinmore did not have the actual interest in the corporation that would have been evidenced by certificates, had they been issued?

The WITNESS: Yes. I didn't mean to say that. They did have that interest of course.

Mr. NEALON: Yes. And you would not have filed these articles of incorporation unless the actual considerations had been made as you named them therein? In other words, you would not have made a misrepresentation to the Arizona Corporation Commission in filing?

The WITNESS: Not intentionally.

Mr. NEALON: No.

The WITNESS: I would like permission to explain that. I can rather see what you are getting at.

Mr. NEALON: I have no objection to any explanation, Mr. Cunningham (247). [728]

The WITNESS: This corporation was organized solely and exactly for the purpose of taking this

(Testimony of Gene S. Cunningham.)

assignment into its name and away from the then holders, like Dinmore, Mills and Owens. If the corporation had been completed, certificates of stock would have been issued. It was contemplated that they had an interest fixed at the time of the organization. The corporation after having been organized, so far as filing the articles, getting a certificate, recording them, and paying those fees, came to the point where the people who were going to put up the money, said, 'Stop and spend no more money'. That was the end of it. 'We are not going on', they said; 'We will not go on'.

Mr. NEALON: The corporation, however, was preserved after your connection with it, was it?

The WITNESS: Yes.

Mr. NEALON: Your disconnection with it?

The WITNESS: Yes.

Mr. NEALON: And what transactions took place after that time you have no knowledge of, have you, Mr. Cunningham?

The WITNESS: Well, yes, I do. I do to the extent of recalling a meeting of the directors——

Mr. NEALON: Yes.

The WITNESS: ——that I was able to insist upon for the purpose of relieving myself and my office from any connection with this corporation.——

Mr. NEALON: Yes.

The WITNESS: ——and that is all. Those minutes I spoke of was for the purpose of receiving

(Testimony of Gene S. Cunningham.)

and accepting and acting upon our resignations as officers and directors.

Mr. NEALON: Yes.

The WITNESS: That was at my request and demand of Mr. Owens, [729] who was then consulting with some attorney in the city (248).

Mr. NEALON: There was no dissolution of this corporation?

The WITNESS: None; none.

Mr. NEALON: There was no attempt in that proceedings to dissolve the corporation?

The WITNESS: None.

Mr. NEALON: Owens' and Dinmore's interest remained in the corporation the same at the time of your resignation as it had been prior to that time?

The WITNESS: That is correct.

Mr. NEALON: You had at the time of the organization of the company a contract, verbal or written, to the effect that the transfer of the property would be made to the Windsor Square Development Company, Incorporated? Wasn't that right?

The WITNESS: No, it did not. It couldn't be dignified with that positive statement. This assignment, exhibit—the one from Owens-Dinmore to the Windsor Square, number 9——

Mr. MACKAY: Number 10, Mr. Cunningham.

The WITNESS: ——number 10, was made and attempted to be delivered to persons then contemplating the organization of a corporation to receive

(Testimony of Gene S. Cunningham.)

it. It was prepared and executed in every way with the exception of the signature of Mr. Dinmore, who was then the only one of those three in the city. He was particularly desirous of leaving the city that night, getting on the train that night. The execution by the other persons there was made by Gibbs over in Dwight B. Heard's office, who acted as their attorney in some fashion. The assignment was taken, not under any (249) contract, agreement, oral or otherwise, but was taken at that time in a most uncompleted manner, with the financing persons in a most unsettled state as to whether they would go on or not. But that night in the hurry [730] and desire of Mr. Dinmore to leave the city he wished to execute it and go away with the knowledge that at least these people were working on bringing about a financial structure, that they would do certain things that would alleviate the then pressure on Owens, Dinmore and Mills. So that is the reason I say that that condition couldn't be dignified by naming it as a contract, oral or otherwise. There was no contract.

Mr. NEALON: Well, there was an understanding, wasn't there?

The WITNESS: Yes, there was an understanding on their part, but the other people, who had agreed to make the financing, hadn't made up their minds to do so.

Mr. NEALON: In other words, the corporation was perfected?

(Testimony of Gene S. Cunningham.)

The WITNESS: Yes, that was done that day.

Mr. NEALON: And the corporation didn't cease to be a corporation during your term of office?

The WITNESS: No, it did not.

Mr. NEALON: And the understanding was that when the corporation was organized the holders of the Windsor Square tract would turn over their interest to the corporation?

The WITNESS: Yes.

Mr. NEALON: So far as they were concerned, there was no question about that?

The WITNESS: No.

Mr. NEALON: Was the amount settled of the stock that was to be issued to them?

The WITNESS: I am not right certain; I couldn't say. I don't know whether it was or not (250).

Mr. NEALON: You had no knowledge as to whether or not there was any failure upon the part of Owens and Dinmore and their wives to make a transfer of their interest in this property to [731] the (251) Windsor Square Development, Incorporated, after you ceased to be connected with the company, had you?

The WITNESS: No.

Mr. NEALON: For all you know, they may have conveyed everything they had to the corporation?

The WITNESS: Yes. I don't know.

(Testimony of Gene S. Cunningham.)

Mr. NEALON: The time that you ceased to be connected with the corporation it was a regularly organized corporation capable of making contracts, was it not?

The WITNESS: Oh, yes; it was an entity under our law.

Mr. NEALON: It was an entity under our law. And at the time that you ceased your connection with the company were other directors elected, or have you any knowledge on that point?

The WITNESS: I don't know; I don't know whether they actually were or not. That is the last I knew of it. I insisted that there should be, and, as I stated to you a while ago, I dictated some minutes and saw that our resignations were taken in there.

Mr. NEALON: And acted upon?

The WITNESS: And acted upon.

Mr. NEALON: They could have only been acted upon, could they not?

The WITNESS: I mean they were all prepared, the minutes were prepared for the new directors, and they were to act upon them.

Mr. NEALON: What I am getting at, Mr. Cunningham, are you still president of that company, or did somebody succeed you?

WITNESS: I don't know, but I hope not.

Mr. NEALON: As a matter of fact, didn't Mrs. Richardson continue until you were relieved of duty, didn't she continue as secretary of the corporation

(Testimony of Gene S. Cunningham.)

until your resignation was acted (252) upon? [732]

The WITNESS: Well, that was the intention, that they were to act then.

Mr. NEALON: And your resignation preceded hers?

The WITNESS: Well, they were both made at the same time.

Mr. NEALON: Your resignation was acted on while she still remained secretary, was it not?

The WITNESS: I don't recall.

Mr. NEALON: I see. Well, you and Mrs. Richardson did not pass upon your own resignations?

The WITNESS: No, as I say, I merely prepared minutes.

Mr. NEALON: I see.

The WITNESS: The idea, Mr. Nealon, was, Mr. Owens wanted this corporation.

Mr. NEALON: Yes.

The WITNESS: I said, 'You can have this corporation. Take it and get out with it, but get us out before you do anything else.' That was my instruction to him.

Mr. NEALON: And so far as you know, that instruction was carried out?

The WITNESS: Well, he assured me that it would be done, and he told me the lawyer with whom he was consulting, and I have a very high regard for and implicit confidence in that lawyer. His initials are Mr. John Gust (253)."

(Testimony of Gene S. Cunningham.)

Redirect Examination by Mr. Mackay.

"Mr. MACKAY: Mr. Cunningham, I want to ask you a question or two more about this assignment. I understood you to say while under cross-examination by Mr. Nealon that one of the signatories whose name appears upon the assignment to Windsor Square Development, Incorporated, was about to leave town, and that it was deemed advisable to secure his signature on that assignment [733] with the contemplation that a binding agreement in regard to the transaction by the interested parties might be later reached.

The WITNESS: No, I think you misunderstood me, or, rather, maybe I didn't make myself clear. The person that I referred to was Mr. Dinmore, one of the persons who hadn't at that time executed that assignment of Owens, Dinmore, and Mills to Windsor Square Development Company. The other persons were not here. Mr. and Mrs. Mills were not here. Mr. and Mrs. Owens were not here at that time. They were acting through Mr. Gibbs, a gentleman in the Dwight B. Heard Company. Mr. Dinmore was here in the city. He was around different places and very excited, very anxious to leave the city, and was going to go out that night whether or not. I wasn't concerned whether he went out or not, but Mr. Mills and those men doing business with him seemed to insist upon it being signed before he left.

(Testimony of Gene S. Cunningham.)

He was around my office several times that day—I met him once at Mr. Taylor's office, I think, that day,—talking up and down the street, when they were in the (254) old building,—considerable excitement. But that was the only reason, because he was going away.

Mr. MACKAY: Well, at the time that the Windsor Square Development, Incorporated, received this assignment was it received pursuant to an agreement which had then been made, or was it received as a provisional assignment under the contemplation that the parties would later agree upon a program under which the assignment was to be taken?

The WITNESS: Oh, no. No, I think that this organization of this company was made for the purpose of taking this assignment and the interest of those people.

Mr. MACKAY: Pursuant to any agreement? [734]

The WITNESS: Well, yes, legally it must have been some agreement, but not a closed, completed, clearly understandable one.

Mr. MACKAY: I gather from your remarks that everything was in the formative stage at the time that the assignment was taken, and that thereafter there was nothing further done?

The WITNESS: Well, I would consider that a formative stage. Have you got the date of the articles of incorporation?

Mr. MACKAY: No, I haven't.

(Testimony of Gene S. Cunningham.)

Mr. NEALON: I haven't a copy of them here, Mr. Cunningham.

The WITNESS: Well, you will find on examination, if you will do so, that this was all at one time, except that this assignment of all these three individuals was executed prior to that time. That execution of that assignment, with the (255) exception of Mr. Dinmore's signature, was prior to the time of the Windsor Square Development Company's existence. That was a part of their plan and scheme or design to do something to get Dinmore and all these people out from under the pressure of the matured indebtedness to different ones, like Mrs. Barringer and the Phoenix Savings Bank and Trust Company and fees of the Phoenix Title and Trust Company and taxes. That was the purpose of it. And the people that were forming this corporation were doing so as a financing proposition, but when they did they didn't want this interest resting in these individuals; they wanted them tied down some way. That was the reason for forming a corporation.

Mr. MACKAY: Did the negotiations ever reach a stage whereby it was agreed that Windsor Square Development Company would accept the beneficial interest under this declaration of trust, and in consideration thereof would assume the debts of Owens, Dinmore, and Mills?

The WITNESS: No. [735]

(Testimony of Gene S. Cunningham.)

Mr. NEALON: I object to that, if your Honor please. Those would be by written instruments, and they would be the best evidence themselves. We doubt if Mr. Cunningham could remember all of the details in regard to that.

The REFEREE: I think that is true. I doubt if such a thing could be done.

Mr. NEALON: And our objection is that it is not the best evidence (256).

Mr. MACKAY: Note our exception.

The WITNESS: Well, I would like to again see that assignment, but I know they didn't assume any indebtedness other than might have been carried along with that assignment. Those were things to be worked out and talked over and agreed upon.

Mr. MACKAY: There was no express agreement either written or oral to the effect that Windsor Square Development, Incorporated, assumed any indebtedness of the assignors?

Mr. NEALON: I object to that for the same reason. If there is any such agreement, let it be produced.

The REFEREE: The same ruling.

Mr. MACKAY: Well, I am asking the witness if there was any such agreement, either written or oral, and he says there was none.

The WITNESS: No, there was not."

(Testimony of Gene S. Cunningham.)

Cross Examination.

By Mr. NEALON:

At the time I was investigating or organizing the corporation, Windsor Square Development Company, I had a conference in which myself, Mrs. Barringer, Mr. Taylor of the Phoenix Title and Trust Company, and Mr. Tom Maddock participated. It took place in the little booth that was ordinarily occupied by George Mickle over at the old Title and Trust company office. I cannot recall the exact time, but it might have [736] been two days or two weeks prior to the date of the articles of incorporation of the Windsor Square Development Company. The meeting was brought about by Mr. Taylor of the Phoenix Title & Trust Company and myself at the time when I represented some parties who were contemplating the taking over of the financing of the indebtedness owed by Dinmore and others to Mrs. Barringer, Phoenix Savings Bank and Trust Company, the municipal taxes, and the office of the Phoenix Title and Trust Company itself to get at the true state of the then indebtedness. Mr. Tom Maddock was called in. He was an engineer in charge of this project and had for one reason or another, kept more or less accurate account of the moneys expended in the way of improvements and it was for the purpose of finding out what the actual value of the partially developed addition was at that time, and what indebtedness

(Testimony of Gene S. Cunningham.)

existed, comprised of matured partial payments to Mrs. Barringer, interest, a large amount of money owing to Maddock and Holmquist, and an amount of money owing to the Phoenix Savings Bank and Trust Company, for which there had been several lots deposited as security. At that time we found out through Mr. Maddock's records that the improvements made were estimated to be about $90,000, with an indebtedness charged against that of $4,000 to Maddock and Holmquist, twenty-eight to thirty thousand dollars to the Phoenix Savings Bank and Trust Company, and a substantial amount to Mrs. Barringer and to the state and subdivisions in the form of taxes.

"Mr. MACKAY: Mr. Cunningham, I am not quite clear on this $90,000 which you stated had been incurred by Mr. Owens and his associates in connection with putting in the improvements. I believe you stated that that matter was discussed.

The WITNESS: Yes. There was an indebtedness. That was an amount of money given us by Mr. Tom Maddock as being the amount of the actual improvements in that property by reason of this [737] promotion and subdivision that he could actually trace through figures. The $90,000 that I referred to in my testimony was an over all amount that he gave to us as being the amount in which this property was enhanced up to that time. He also said, 'I can't in anywise tell you the amount

(Testimony of Gene S. Cunningham.)

of money that has been expended in the way of advertising and such as that, but,' he says, 'I can trace that amount, $90,000.'

Mr. MACKAY: I don't know the exact purpose of this, your Honor. It seems to me, your Honor, we are getting hearsay evidence into the record as to the value of improvements which have been constructed by the bankrupt's predecessor in interest.

I don't know what you have in mind to establish, Mr. Nealon, but if that is the matter that you do seek to establish, I wish to strike the last answer of the witness on the ground that it constitutes hearsay.

Mr. NEALON: Now, if your Honor please, I think we could get along a little faster if we proceed in an ordinary, proper way.

The REFEREE: Well, it may stand subject to the objection. Proceed.

Mr. MACKAY: Exception.''

The WITNESS resuming: It is hard for me to remember exactly, but I am quite sure that the incorporation of the Windsor Square was subsequent to this conversation at the conference I have just referred to. Nothing was said at this conference about current accounts other than this $12,000 that Tom Maddock kept talking about as owing to him and Fritz Holmquist. He insisted on that most of the time. I don't know whether the Windsor Square Development Company maintained the caretaker on the premises during the time in which

(Testimony of Gene S. Cunningham.)

the Windsor Square Development Company, Inc. took the transfer of the interest in that property to which I have referred. From my own knowledge, [738] I don't know that the pumping of water and so forth proceeded, but from other reasons I know that it did. Technically, I guess that Windsor Square was conducted by the corporation just as it had been done preceding that time, but actually we never knew a thing about it. We incorporated and quit. That is all we did. The reason I know about the pump going all the time, I had other interests and I knew it from that, but not as a stockholder or president of the Windsor Square. Legally I know that so far as that cost was incurred during the time that the Windsor Square took this transfer of interest that there was that liability created against the corporation, whatever it may have been; practically we didn't know anything. The current debts and the payment thereof were not discussed at any time in our dealings. The figures that I got at that meeting, I presented to my principals, and that is all. They took them among themselves and talked them over, and that is all I know about it. I would like to say something by way of explanation of something that might look like a discrepancy in the record. All these negotiations only covered a matter of a few days or two or three weeks. But the matter of taking the assignment that we talked about yesterday from Owens and Dinmore, and so forth, to the Windsor Square

(Testimony of Gene S. Cunningham.)

Development Company, and the organization of Windsor Square Development Company, all happened at one time, one day. Dinmore was going out of town at eight o'clock that night, and went. He left that night, so it was all done one day, whatever day that was, irrespective of what date might appear in that assignment to Windsor Square Development Company. In organizing this corporation there was no plan to avoid the liabilities that the previous owners had contracted. [739]

Redirect Examination.

By Mr. MACKAY:

"Mr. MACKAY: Mr. Cunningham, I didn't understand exactly your statement to the effect that technically Windsor Square Development, Incorporated, looked after some of these activities, such as pumping, and the like, but actually it did not. Am I stating fairly approximately your statement in that respect?

The WITNESS: Yes. Yes, it might appear that way. I can explain it.

Mr. MACKAY: Let me ask you, from the organization of this company until the transfer to Mr. Owens was made in October of 1930 did the directors of the company ever meet for the purpose of authorizing its officers or agents to employ a caretaker or to incur any liability in the preservation and maintenance of Windsor Square?

The WITNESS: No.

(Testimony of Gene S. Cunningham.)

Mr. MACKAY: Did they do so informally in any way?

The WITNESS: No.

Mr. MACKAY: Did any of the officers of the company perform or assume to make arrangements for the pumping or other (316) preservation of Windsor Square?

The WITNESS: No.

Mr. MACKAY: And did any officer or agent of the company to your knowledge secure any extension of credit or make any disbursement of money or other thing of value for the purposes that I have just mentioned?

The WITNESS: No. (317)." [740]

WITNESS ON BEHALF OF RESPONDENT W. R. WELLS

W. R. WELLS

called as a witness on behalf of Respondent W. R. Wells, testified as follows:

Direct Examination.

By Mr. WALTON:

I have a deed to Lot 2 in Block 1 (258). I also have a deed to Lot 21 in Block 1. I have a contract to purchase Lot 1 in Block 1 and Lot 20 in Block 1. Phoenix Title and Trust Company, as Trustee, is the Seller under that contract. On July 15, 1930,

(Testimony of W. R. Wells.)

I owed a balance of $167.02 on Lot 1 in Block 1 and a balance of $460.36 on Lot 20 in Block 1. Since then I made regular payments in August, September, October and November. I will furnish copies of the sales agreements referred to (260).

Cross Examination.

By Mr. NEALON:

"Mr. NEALON: So you hold two lots at the present time under contract?

The WITNESS: Yes, sir.

Mr. NEALON: At the time of entering into this contract did you have any notice of any claim of lien by Mrs. Barringer on the lots?

Mr. MACKAY: I object to that, your Honor, on the grounds that it is irrelevant and immaterial and not proper cross examination.

Mr. NEALON: Mr. Walton might make that last objection, but I don't understand you can.

The REFEREE: It may be answered.

Mr. MACKAY: Note our exception, please.

The WITNESS: I do not recall that I had any sort of written notice or anything of that sort. Quite a bit of conversation and rumor caused me to be aware that there was a controversy, possibly such a lien (261). [741]

Mr. NEALON: At the time you purchased the lots?

(Testimony of W. R. Wells.)

The WITNESS: At the time I purchased the first lot, no, sir.

Mr. NEALON: Were you ever shown any instrument called a declaration of trust?

Mr. MACKAY: I object to that on the ground that it is improper cross examination, and incompetent, irrelevant, and immaterial.

Mr. WALTON: If your Honor please, I object too on the same grounds. I don't see that it is material whether he knew about the declaration of trust or not.

The REFEREE: Well, in this matter of examining claims there is great latitude. The Trustee has rights here to ascertain the true status of affairs. You may proceed. Objection overruled.

Mr. MACKAY: Exception.

The WITNESS: I do not at this time recall whether I was or not.

Mr. NEALON: You don't recall whether you were or not? Is that your answer?

The WITNESS: Yes, sir.

Mr. NEALON: Just what is your recollection of what representations were made to you at the time you purchased the lots? (262)

Mr. MACKAY: I object to that on the ground that the contract, a copy of which will be offered in evidence, provides that no representation of the seller or any of its agents shall be material and that all of the representations and agreements are contained in the written instrument.

(Testimony of W. R. Wells.)

The REFEREE: I would like to understand the situation here. I understood on request of counsel that this was a matter of permitting a certain party who had been ordered to show cause here on a claim against the estate.

Mr. NEALON: Yes.

The REFEREE: From what source, Mr. MacKay, do you make an examination of this party? By what right? [742]

Mr. MACKAY: Well, I agree with your Honor that the examination so far has been by Mr. Walton and probably that the Trustee has a right to cross examine, but I believe that the Trustee's attorney is making an attempt to go beyond the limits of proper cross examination and has endeavored to show that this particular person had no notice of Mrs. Barringer's lien; and if counsel is endeavoring by this witness to open up his own case, I think I have the right to cross examine and also to object to the examination as conducted by Mr. Nealon.

The REFEREE: I think not. This is a proceeding, so far as this court is concerned, that you are not interested in (263). This is a private party who entered his appearance here in response to an order to show cause, and the Trustee has a right to ascertain what the claims are in accordance with the order; but it doesn't mean that every party interested in the estate has a right to take part in that particular hearing. To find out as to whether it

(Testimony of W. R. Wells.)

might be binding upon your party is another question. The Trustee has a right to inquire in this as to whether any claim against this estate is a valid claim.

Mr. MACKAY: Well, I will simply ask the Court to make its ruling and save our exceptions. I will preserve the rights of our client as I see them.

The REFEREE: Well, that is the ruling. Proceed, Mr. Trustee."

The WITNESS resuming: The first lot, Number Twenty-one in Block One, was purchased while the Windsor Square was going along as a live subdivision and it was purchased from the people who had this property for sale. No questions were asked on my part as to who might or might not have liens or anything of that sort at that time. It didn't occur to me (264). No other information, than that contained in the deeds and contracts, was furnished to me. Mr. Taylor was not present when I looked at the [743] lot. The Mr. Taylor whom I refer to was sales manager and not L. J. Taylor of Phoenix Title and Trust Company (265). I had no conversation with L. J. Owens, Jr. prior to purchasing Lot 21, Block 1. Subsequently, I talked to Mr. Owens in my office. The paving was completed in front of Lot 21, Block 1, when I purchased it. Mr. Owens did not show me that lot (266).

"Mr. MACKAY: If the Court please, I wish the record to show that we object to any questioning

(Testimony of W. R. Wells.)

by Trustee's counsel of the witness concerning representations made in connection with the negotiation of the witness's contracts, which were in writing and which have been offered in evidence, or which will be offered in evidence by way of copies under stipulation of counsel; and rather than renew the objection as each question is asked, I wish to have it understood that we object to all of this questioning."

The WITNESS resuming: I do not recall Mr. Taylor's initials (267). Before going to see the lots I called at the subdivision office where Mr. Taylor, or someone, gave me information concerning prices.

"Mr. NEALON: Well, now, whom did you deal with in regard to the other lots?

The WITNESS: Mr. Owens.

Mr. NEALON: And did Mr. Owens make any representations to you about it?

Mr. MACKAY: About what, Mr. Nealon? (268).

The REFEREE: Well, I will have to state again, Mr. MacKay, that this is not your hearing. This is a hearing between the Trustee and another party. I say, so far as its binding effect upon you, that is another question, but this hearing is between the Trustee and this party who answers (269) this order. [744]

Mr. WALTON: Judge, I made the objection because Mr. Nealon was getting a little wider, he was going into a question as to the condition of the

(Testimony of W. R. Wells.)

property. Now, if his questioning is intended to go into a matter of knowledge of title conditions, title and lien conditions, I don't object to that; but he was widening it into something about the property which I don't think is in issue under the pleadings.

The REFEREE: Now, that part of it is just to learn the status of the transaction so far as the predecessor is concerned. But I will have to insist that such hearings as this are not general; they are between the parties only. The time can't be taken up with the permitting of parties who might have a possible interest here under one of these examinations. This is the Trustee's business with this particular party.

Mr. MACKAY: Well, now, your Honor, the Trustee by this examination is clearly endeavoring to show by this witness that he had no knowledge of the Barringer lien. It is in aid of his contention that the Barringer lien is secret. Now, if under the pretense of cross examining this witness he goes into the issues that have been raised between the Trustee and my client, I am going to insist on the right to object and the right to cross examine and the right to argue the matter, and I want the record to show everything (270) in respect to it.

The REFEREE: Well, you will be denied that right here, Mr. MacKay.

Mr. MACKAY: Well, I insist on it. Let the record so show.

(Testimony of W. R. Wells.)

The REFEREE: Even upon your insistence you will not be permitted to do it, not in this hearing. Proceed, Mr. Trustee.

The WITNESS: At the time I negotiated the purchase of other lots Mr. Owens told me of his financial condition. [745]

Mr. MACKAY: I wish to ask the witness a question, your Honor.

The REFEREE: Just a minute. Upon what ground, Mr. MacKay?

Mr. MACKAY: Upon the ground that the Trustee in this examination is going into the issues between the Trustee and Mrs. Barringer.

The REFEREE: That would make no difference here. There might be a dozen such procedures that might enter such questions. That will be all, Mr. Witness.

Mr. MACKAY: I wish the record to show that we are denied the right of cross examining this witness and that we take exception to the Court's denial."

WITNESS ON BEHALF OF RESPONDENT E. L. GROSE.

E. L. GROSE

called as a witness on behalf of Respondent E. L. Grose, testified as follows:

"Mr. CUNNINGHAM: I intend to prove that Respondent Grose purchased lots in Windsor Square

(Testimony of E. L. Grose.)

without knowledge of Mrs. Barringer's lien under the Declaration of Trust (273).

Mr. MACKAY: I object to any testimony being offered by Mr. Grose to the effect that he did not have notice of the lien set up in Mrs. Barringer's favor under the Declaration of Trust (274).

Mr. GUST: Your controversy is entirely as to whether or not the Trustee has a right to declare your client's contract forfeited.

Mr. CUNNINGHAM: I think so; I think so. Other than that, I think it is mere information.

Mr. GUST: Well, if the examination is confined to that, I have no objection.

Mr. NEALON: That is not the Trustee's position. The Trustee's [746] position is that the status of this contract would be established in these proceedings, so that Mr. Grose will know what he owes, if anything, and the Trustee will know what Mr. Grose owes, if anything, so that the sale may be made and those contracts may be collected, and that is the main issue as the Trustee sees it. He is brought in here to set up his rights (285)."

Direct Examination.

By Mr. CUNNINGHAM:

I live in Phoenix. My wife's name is Maude M. Grose (286). In March, 1929, I read advertisements which stated that Windsor Square, an improved subdivision, was for sale. Then my wife and I drove through it in our car. It had a sign on the corner

(Testimony of E. L. Grose.)

reading "Windsor Square—Owens-Dinmore". It looked attractive. We met Mr. Owens on the tract. He told us about the property and quoted us prices. We then drove through the subdivision, saw a lot we liked, and went back to see Owens. We picked out a corner lot (287), which had a curb around it and paving in front of it. Owens quoted the price at $1,775, providing Colter Street were paved (288).

"Mr. MACKAY: (Interrupting) Now, if the Court please, we wish to object to any testimony to the effect of any oral agreements or representations made by Mr. Owens or any other persons to Mr. Grose on the ground that it appears from Mr. Grose's pleading that he entered into a written contract, and that contract provides that no representation or promise of any person heretofore made shall be binding upon the vendor.

Mr. CUNNINGHAM: There is also a breach of the contract set up in the response.

Mr. NEALON: Also, if your Honor please, it is the contention of the Trustee that the Phoenix Title and Trust Company were not the real owners of the property. [747]

The REFEREE: Well, it may go in subject to the objection.

Mr. MACKAY: Exception."

The WITNESS resuming: I made a down payment on February 17, 1929, subject to the Owens-Dinmore Company approval of Colter Street. On

(Testimony of E. L. Grose.)

the receipt finally given me for the additional amount, the reference to Colter Street was stamped out. I was dealing with L. D. Owens who, with others, was promoting the tract. When I saw the lot it had a curb and sidewalks in front. They were paving the street but the paving had not quite reached this lot (289). They had a sign on a corner which stated that the paving would be completed and lights and water installed by a certain time. The sign bore the name Owens-Dinmore (290). Later I bought the adjacent lot, namely: Lot 2, Block 4. Again I dealt with Mr. Owens at the subdivision. The sign bearing the name Owens-Dinmore was still there. They were still working on the paving and were setting up ornamental street lighting poles. Cement walks and curbs were in. The paving in front of the two lots was never completed. It stops fifteen feet after crossing the lot line in front of Lot 2 (291). I had no dealings with Phoenix Title and Trust Company when negotiating for the lots. Neither Owens nor any other person on the tract informed me concerning the status of Phoenix Title and Trust Company. No one on the tract purported to represent that company (292).

"Mr. CUNNINGHAM: And at that time what was said by him and what was said by you concerning the Phoenix Title and Trust Company?

Mr. MACKAY: If the Court please, we object to any testimony as to any conversation concerning

(Testimony of E. L. Grose.)

the title of the land which Mr. Grose has testified he purchased, for the reason that it appears that the contract is in writing and that all of its terms are contained therein. [748]

The REFEREE: Objection overruled.

Mr. MACKAY: Exception."

The WITNESS resuming: Owens stated that payments under the contract were to be made at the office of Phoenix Title and Trust Company, where I was to sign an agreement. He also stated that when payments were completed a deed, then in escrow, would be delivered to me (292). My first conversation with Owens was on February 17, 1929. I signed the contract on March 20, 1929. My next conversation with Owens was in September, 1929. I signed the second contract on October 9, 1929 (293). I made payments to Phoenix Title and Trust Company for eighteen months on the first contract and for twelve months on the other. I quit making payments because Mr. Owens told me he was going to put the tract into bankruptcy and did not know what my status was (293).

"Mr. CUNNINGHAM: At the time you had that first conversation with Mr. Owens, when you were talking about the street on the north of this addition, which, I believe, is Colter Street——

The WITNESS: Yes, sir.

Mr. CUNNINGHAM—state to the Court what was said, if anything, between you as to the pur-

(Testimony of E. L. Grose.)

chase price of Lot One in Block Four with Colter Street paved and what it was without Colter Street paved.

Mr. MACKAY: I object to that question on the ground that it seeks to vary the contents of the written agreement.

The REFEREE: Objection overruled.

Mr. MACKAY: Exception.

The WITNESS: The price with Colter Street paved was, as stated in the receipt that I got, $1,775; and without the paving the price was to be reduced, estimated between two hundred and fifty and four hundred dollars on that lot. [749]

Mr. CUNNINGHAM: And at the time that you had this conversation concerning the price of this Lot One, Block Four, in the event Colter Street was paved, what was said by you and by Mr. Owens at that time, if anything, as to whether or not it was finally determined that Colter Street would be paved?

Mr. MACKAY: The same objection, your Honor.

The REFEREE: The same ruling.

Mr. MACKAY: Exception.

The WITNESS resuming: Owens stated to me that the price on Lot 1, Block 4, would be reduced between $250 and $400 if the paving were not completed in front of it (294). Before I purchased Lot 1, Block 4, Owens told me he had made satisfactory arrangements for paving Colter Street.

(Testimony of E. L. Grose.)

"Mr. CUNNINGHAM: And the street on which these two lots faced in the addition, what was said by him, if anything, at that time about the paving of that side street?

Mr. MACKAY: The same objection, your Honor.

The REFEREE: The same ruling.

Mr. MACKAY: Exception."

The WITNESS resuming: I do not recall whether anything was said concerning the paving of Colter Street because it was just agreed between us that such paving was to be installed.

"Mr. MACKAY: Well, I move that all of the testimony of the witness be stricken, on the ground that Mr. Grose in his appearance has alleged that he has a written contract and certain rights thereunder, which counsel refuses to produce and introduce.

The REFEREE: The motion made is denied.

Mr. MACKAY: Exception.

Mr. CUNNINGHAM: Now, at the time that you were making these payments to the Phoenix Title and Trust Company prior to the [750] date on which you ceased, as you testified a moment ago, I will ask you whether or not you knew of any mortgage or any lien upon these two lots that you purchased.

Mr. MACKAY: We wish to object to that on the ground that it is incompetent, irrelevant, and immaterial for any purpose whatever.

(Testimony of E. L. Grose.)

The REFEREE: Objection overruled.

Mr. MACKAY: Exception.

The WITNESS: My answer to the last question by Mr. Cunningham is 'no.'

Mr. CUNNINGHAM: I believe you stated that the purchase price of the first lot, Lot One, Block Four, was $1,765, Mr. Gros?

The WITNESS: 1775.

Mr. CUNNINGHAM: 1775.

Mr. MACKAY: We object to that on the ground that it appears in the contract and the contract is in writing and the contract is the best evidence upon the prices.

The REFEREE: Objection overruled.

Mr. MACKAY: Exception.

Mr. CUNNINGHAM: And the second lot was——

The WITNESS: 1675.

Mr. MACKAY: The same objection.

The REFEREE: The same ruling.

Mr. MACKAY: Exception.

The WITNESS: Yes, 1675 on easy——

Mr. CUNNINGHAM: Yes.

Mr. CUNNINGHAM: Now, at the time that you were upon these premises, and prior to your determining to buy either of the lots, and at the time that you saw the pavement partially constructed and at the time that the statement was made by Mr. Owens that [751] the pavement would be constructed you believed that it would, did you?

(Testimony of E. L. Grose.)

The WITNESS: Yes, sir.

Mr. CUNNINGHAM: And relied upon it?

The WITNESS: Yes, sir.

Mr. CUNNINGHAM: And bought the lots?

The WITNESS: Bought them on that statement."

Thereupon, there was received in evidence, as Respondent Grose's Exhibit No. 1, a written contract for the sale and purchase of Lot 1, Block 4 of Windsor Square.

RESPONDENT GROSE'S EXHIBIT NO. 1.

Respondent Grose's Exhibit No. 1 is a written contract, dated March 20th, 1929, duly executed, but not acknowledged, by Phoenix Title and Trust Company, as Trustee, as seller, and E. L. Grose and Maude M. Grose, his wife, as buyer. It is entitled "Windsor Square—Sales Agreement". By its terms the seller agrees to sell and convey to the buyer Lot 1, Block 4, for a total purchase price of $1,775, payable as follows: $355 cash, receipt of which is acknowledged, the balance in monthly installments of $35.50 each, with interest at the rate of 7% on deferred payments. Buyer agrees to pay 1929 and subsequent taxes and water assessments. It contains the following stipulation:

> "It is understood and agreed the Buyer is of legal age and that said property has been

(Testimony of E. L. Grose.)

inspected by the Buyer or the Buyer's duly authorized agent; that the same is, and has been, purchased by the Buyer as the result of said inspection and not upon any representation made by the Seller, or any selling agent, or other agent of the Seller, and the Buyer hereby expressly waives any and all claims for damages because of any representation made by any person whomsoever other than as contained [752] in this agreement, and the Seller shall not be responsible or liable for any inducement, promise, representation, agreement, condition or stipulation not specifically set forth herein."

It also is provided that time is the essence of the agreement and that in the event buyer fails to pay any installment of the purchase price or perform any of his agreements, seller may declare the whole amount due and payable, or enforce a forfeiture of buyer's rights under the contract. It is provided that seller shall convey said premises to buyer on full payment of said purchase price, and at the same time issue to buyer sellers' regular form of title insurance in the amount of the purchase price. On the reverse of said exhibit the monthly installments from April, 1929, to and including September, 1930, are marked paid.

Thereupon, there was received in evidence, as Respondent Grose's Exhibit No. 2, a written contract for the sale and purchase of Lot 2, Block 4, of Windsor Square.

(Testimony of E. L. Grose.)

RESPONDENT GROSE'S EXHIBIT NO. 2.

Respondent Grose's Exhibit No. 2 is a written contract, dated October 9, 1929, duly executed, but not acknowledged, by Phoenix Title and Trust Company, as seller, and E. L. Grose and Maude M. Grose, his wife, as buyer. It is entitled "Windsor Square—Sales Agreement". By its terms the seller agrees to sell and convey to the buyer Lot 2, Block 4, for a total purchase price of $1,675, payable as follows: $335 cash, receipt of which is acknowledged, the balance in monthly installments of $33.50 each, with interest at the rate of 8% of deferred payments. Buyer agrees to pay 1929 and subsequent taxes and water assessments. It contains all of the agreements and stipulations appearing in Respondent Grose's Exhibit [753] No. 1. On the reverse of said exhibit the monthly installments from November, 1929, to and including September, 1930, are marked paid.

"Mr. CUNNINGHAM: Then, the receipts testified about by the respondent Grose I also offer in evidence, with the same reservation that I may supplant them with copies.

Mr. NEALON: No objection to that procedure, so far as the Trustee is concerned, and no objection so far as the Trustee is concerned, to the introduction of the instruments offered.

Mr. MACKAY: Mrs. Barringer objects to the introduction of these receipts on the ground that they are integrated into the contracts which have been already introduced by respondent Grose.

The REFEREE: The objection is overruled.

(Testimony of E. L. Grose.)

The receipts referred to were thereupon received in evidence as Respondent Grose's Exhibit No. 3.

RESPONDENT GROSE'S EXHIBIT NO. 3.

Said exhibit consists of five instruments which are, respectively, in words and figures as follows, to-wit:

(First Instrument)

"PHOENIX TITLE & TRUST CO. 75369

Phoenix, Arizona

Date 9-30-30.

Received of E. L. Grose $100.50

One Hundred & 50/100 Dollars Installment due ..... 192.....

v

To be applied on—Escrow—Trust—Estate No. 418-104 General 1.01. [754]

Remarks:

91 - 3 207.00

		Escrow : Trust : Estate : General :
Lot 2		Principal 7572
Block 4		Int. from 9/30/30 to 2478
Tract Windsor Square		Revenue fee .....
Old Bail	$	Title Charge .....
Applied on Prin.	$	Insurance .....
New Bal.	$1061.76	Collection fee .....
.....		Acct. Rec. .....
.....		Total .....: 100.50

If this payment is not strictly in accordance with the terms of the contract it is taken subject to acceptance.

PHOENIX TITLE & TRUST CO.

By F. OLIVER

Cashier."

(Testimony of E. L. Grose.)

(Second Instrument)

"PHOENIX TITLE & TRUST CO. 75370

Phoenix, Arizona

Date 9-30-30

Received of E. L. Grose $106.50.

One Hundred Six & 50/100 Dollars. Installment due ..... 192.

v

To be applied on-Escrow-Trust-Estate No. 418-103 General 1.07.

Remarks:

	Escrow:Trust:Estate: General
Lot 1	Principal 8907
Block 4	Int. from 9/20/30
Tract Windsor Sq.	to 1743
Old Bal. ..... $	Revenue fee .....
Applied on Prin. $	Title Charge .....
New Bal. ..... $ 906.44	[755]
.....	Insurance .....
.....	Collection fee .....
If this payment is not strictly in accordance with the terms of the contract, it is taken subject to acceptance.	Acct. Rec. .....
	Totals $106.50

PHOENIX TITLE & TRUST CO.

By F. OLIVER

Cashier."

(Testimony of E. L. Grose.)

(Third Instrument)

"WINDSOR SQUARE

No. 552

February 28th, 1929

OWENS-DINMORE COMPANY,
138 N. Central Avenue,
Phoenix, Arizona.

Gentlemen:

Please reserve for me Lot 1 in Block 4 of Windsor Square as shown on map filed with the Board of Supervisors of Maricopa County, State of Arizona.

I hand you herewith the sum of $355 which you shall consider as a credit on the purchase price of said lot, the balance of which shall be paid as follows: $ ..... upon demand; the balance to be paid monthly at the rate of $35.50 per month, including interest at the rate of seven per cent. per annum on unpaid balances.

Upon your acceptance I agree to execute a formal agreement or sales contract in the form submitted by the Phoenix Title and Trust Co. for the purchase of said property. I have read and acknowledge receipt of a list of the restrictions and covenants to be included in said sales agreement. I also agree to execute a regular form of maintenance contract [756] with the Windsor Square Improvement Company, a corporation, providing for an annual charge of $12.00, beginning January 1, 1930.

In the event that I fail to pay said balance of

(Testimony of E. L. Grose.)

the down payment or to execute said formal sales agreement and said maintenance contract, the amount paid you herewith may be, at your option, forfeited as liquidated damages.

I understand that this reservation is subject to your acceptance, and in the event that said reservation is not accepted all amounts paid hereunder shall be refunded to me.

Very truly yours,
E. L. GROSE
Address: 324 W. Willetta
Phone. 6426—

Note $55 of the above amount of $355, has been previously receipted for—

The above reservation has been accepted this 1st day of March, 1929, by Owens-Dinmore Company.

Per Owens Dinmore Co.
(to be signed by L. D. Owens or H. C. Dinmore, only)
By W. Caverlin."

The fourth and fifth instruments are written on forms identical to the third instrument, but cover the other lot referred to by the witness.

Cross Examination.

By Mr. MACKAY:

The WITNESS: When I first negotiated with Mr. Owens I supposed that he and his associates were the owners of the property. My supposition

(Testimony of E. L. Grose.)

was not based on any examination of records of title or any other instruments.

"Mr. MACKAY: Could you tell us why you assumed that Mr. Owens was the owner?

The WITNESS: Because they were advertising as the owners of the Windsor Square and were selling Windsor Square, and I was buying a Windsor Square lot. They were in possession of the property, selling it. [757]

Mr. MACKAY: Do you have in your possession any of the advertisements as to which you refer?

The WITNESS: No, but I can get them.

Mr. MACKAY: Do you recollect accurately their contents?

The WITNESS: Oh, no.

Mr. MACKAY: Are you certain that it appeared in such advertisements that Mr. Owens was the owner, or would it be possible?

The WITNESS: No, it was Windsor Square. My contracts were with the Windsor Square. When I made arrangements to buy the lots the arrangements for keeping up the lots and all were with Windsor Square.

Mr. MACKAY: Was that a corporation?

The WITNESS: Presumably it was. I thought it was (303).

Mr. MACKAY: Was that its full corporate name, as far as you understand the matter?

The WITNESS: Oh, I don't remember what the technical name of it was.

(Testimony of E. L. Grose.)

Mr. MACKAY: But you saw advertisements to the effect that lots were for sale in Windsor Square. And did those advertisements bear the name of Mr. Owens?

The WITNESS: Owens-Dinmore, I think they were—Owens-Dinmore or Owens-Dinsmore, I forget which it is.

Mr. MACKAY: And after the lapse of a year you are certain that you can recall that Owens-Dinmore were held out as owners or that they were broadcast or——

The WITNESS: They even had an auction out there and brought an auctioneer out there and posed as owners before the notary public at the auction. I can remember distinctly that and can get you the names of some of the persons that were out there.

Mr. MACKAY: Was that before or after you—— [758]

The WITNESS: That was after.

Mr. MACKAY: So that you did not rely on them——

Mr. MACKAY: I move that the answer of the witness in regard to the auction be stricken, for the reason that it is immaterial.

Mr. CUNNINGHAM: I think it was called for by the questions of counsel on cross-examination.

The REFEREE: It may stand (304).

Mr. MACKAY: Note our exception.

The WITNESS: On March 20, 1929, when I signed the sales contract, I thought that Mr. Owens

(Testimony of E. L. Grose.)

and his associates were the outright owners of Windsor Square (305).

Mr. MACKAY: And notwithstanding that assumption on your part you entered into a contract for the purchase of this lot with Phoenix Title and Trust Company?

The WITNESS: Yes, sir. May I explain why?

Mr. MACKAY: No.

Mr. NEALON: I think the witness has a right to explain.

The REFEREE: The witness may explain why.

The WITNESS: There was a little personal matter connected with it. I am representative of a life insurance company. We do a lot of loaning here. We do all of our business with the Phoenix Title and Trust Company, and have absolute and implicit confidence with them. I went in to sign this contract on the theory that they were agents in the deal and I didn't read the contract and I would do the same thing with the Phoenix Title and Trust Company today.

Mr. MACKAY: So you felt that the Phoenix Title and Trust Company in this matter was acting as the agent for Mr. Owens and his associates?

The WITNESS: Yes, sir (306)." [759]

Cross Examination.

By Mr. NEALON:

"Mr. NEALON: Had you any reason to believe that the Phoenix Title and Trust Company towards this subdivision was any different than the relation

(Testimony of E. L. Grose.)

of the Phoenix Title and Trust Company to other subdivisions which they handled?

The WITNESS: No, sir.

Mr. MACKAY: Are you aware that they handled many subdivisions in which there is no mortgage or lien involved?

The WITNESS: Am I what?

Mr. MACKAY: Are you aware of the fact that they handle such subdivisions?

The WITNESS: Well, I presume so, yes, sir. I couldn't swear to it, but then I take it as a matter of course that they do (307)."

Further Cross Examination

By Mr. MACKAY:

I do not know what the relations of Phoenix Title and Trust Company with the interested parties in other subdivisions are (307). I did not employ an attorney to examine the title before I purchased the two lots. I made no examination of the records in the County Recorder's office, nor did I make any investigation whatever. I had no communications with Mrs. Barringer or any of her representatives. I do not remember the exact date on which Owens stated to me that he intended to throw the project into bankruptcy. It probably was in September (308). He did not state his purpose in detail but told me he was having trouble with the people to whom he owed money. He did not state what he hoped to accomplish by throwing the matter into bankruptcy (309).

(Testimony of L. J. Taylor.)

Thereupon, it was agreed by counsel present that the evidence adduced by Respondent Barringer shall be available to support the answer filed by Phoenix Title and Trust Company (319-320). [760]

WITNESS ON BEHALF OF RESPONDENT PHOENIX TITLE & TRUST COMPANY.

L. J. TAYLOR

called as a witness for Respondent Phoenix Title and Trust Company, testified as follows:

Direct Examination.

By Mr. GUST:

Pursuant to the Declaration of Trust (Respondent Barringer's Exhibit 2) Phoenix Title and Trust Company executed many sales contracts and issued deeds thereunder. The trust was active. All acts done by Phoenix Title and Trust Company were in accordance with my understanding of the provisions of the Declaration of Trust (320) and the two modifications thereof (Respondent Barringer's Exhibits 4 and 5). In carrying out the Declaration of Trust Phoenix Title and Trust Company recognized the assignments which are in evidence. Phoenix Title and Trust Company executed contracts to sell certain of the lots described in this proceeding (321). It gave a contract to Raymond Nier to purchase Lot 16, Block 1. This contract was executed upon instructions received from Messrs. Owens, Dinmore

(Testimony of L. J. Taylor.)

and Mills. Payments thereunder were not completed but no action has been taken to terminate the contract (322). I will furnsh a list of any other lots (involved in this proceeding) which were at the time of bankruptcy subject to an agreement to purchase (322). Such list will show the amount paid, the date of the last payment and whether any forfeiture has been declared.

Thereupon, it was agreed by counsel that such list, when prepared, shall be received in evidence (322).

The WITNESS resuming. When the petition in bankruptcy was filed Phoenix Title and Trust Company continued to carry out all [761] sales agreements theretofore executed. No new sales of lots were negotiated. Some lots in Windsor Square were sold on orders of the referee in bankruptcy, but such lots had been released from Respondent Barringer's lien and were assigned by the bankrupt, or by Mr. Owens, to Phoenix Savings Bank & Trust Company as collateral (323). Such lots are not described in these proceedings. Since bankruptcy I have recognized the instructions and requests of the trustee in bankruptcy. All fees, payable under the Declaration of Trust to Phoenix Title and Trust Company, have been paid. Payment has been effected by deduction from moneys as they came in. Such deductions have not been questioned by the trustee in bankruptcy or Mrs. Barringer (324). Mr.

(Testimony of L. J. Taylor.)

Nealon and Mr. MacKay, respectively, have conferred with me on numerous occasions for the purpose of obtaining information for these proceedings. I have attended each day of this hearing with the exception of two days (325). Mr. Hartley and Mr. Espey in our office have spent forty or fifty hours since bankruptcy in connection with work under the Declaration of Trust. I, Mr. Hartley and Mr. Espey are regular employees, each receiving a regular salary. Other work was held in abeyance during the time we devoted our efforts to this matter (326). I would estimate the value of our time at $125 or $130. Phoenix Title and Trust Company has hired Mr. Gust to represent it in this proceeding (327), and has obligated itself to pay him for his services, although no amount therefor has been stipulated (333). Mr. Gust has been appearing at this hearing for five and a half days.

Thereupon, it was stipulated by counsel that $25 per day would be reasonable compensation for the services of the trustee and its officers in appearing at this hearing (334). [762]

Cross Examination.

By Mr. MACKAY:

The WITNESS: Part of the forty or fifty hours spent by officers and employees of Phoenix Title and Trust Company was for the purpose of accommodating counsel for the various parties (337).

(Testimony of L. J. Taylor.)

Re-direct Examination.

By Mr. GUST:

The WITNESS: We accommodated counsel by giving them information which they needed in representing their clients in this proceeding. (338).

Cross-Examination.

By Mr. NEALON:

The WITNESS: Approximately one-third of the services, which I have testified were worth $125 to $130, were performed in connection with these proceedings (338). The balance of our time was devoted to assisting the trustee in bankruptcy in phases of administering the bankrupt's estate other than this proceeding (339). Phoenix Title and Trust Company has since the commencement of bankruptcy executed only one sales agreement. It was in consummation of a transaction closed, except as to formal execution of the contract, before bankruptcy (340). From the improvement fund Phoenix Title and Trust Company disbursed the first $53,000 for street improvements. $13,000 of this amount was received from Phoenix Savings Bank & Trust Company (341). $53,000 did not comprise all the funds that were spent on Windsor Square in improvements.

"Mr. NEALON: When was the last payment made on improvements?

Mr. MACKAY: If the Court please, may the record show our objection to any further examina-

(Testimony of L. J. Taylor.)

tion as to the amount of expenditures for improvements by the Trustee, on the ground there is no issue regarding such payments involved in this proceeding. Our theory of the declaration of trust is that the beneficiary was bound to [763] put up this money to make improvements and that it had no effect on the interest he had under the declaration of trust.

The REFEREE: I was not taking into consideration that part of it. It seems to me——

Mr. MACKAY: I don't take it that it is the position of the Trustee in bankruptcy, if I may interrupt you, that by advancing these moneys the beneficiary under the contract became entitled to any quasi rights.

The REFEREE: It is showing facts of what they expended. It might be material on the questions involved.

Mr. NEALON: It is very material, if you want to take an avowal of counsel.

The REFEREE: The objection is overruled.

Mr. MACKAY: An exception."

The WITNESS: The last disbursement by Phoenix Title & Trust Company for improvements, properly chargeable to the improvement fund under the declaration of trust, was made on October 21, 1929 (343). All sales contracts executed by Phoenix Title and Trust Company were, as to form, identical to Respondent Grose's Exhibit No. 1. The same printed

(Testimony of L. J. Taylor.)

form was used in all cases (344). In some instances a provision for a subsequent paving lien assessment was inserted in the contract. The same form of deed was used for conveying to purchasers who paid their contracts in full (346).

Re-Examination.

By Mr. MACKAY:

The $53,000 furnished by Owens and his associates was disbursed by Phoenix Title and Trust Company according to its understanding of the declaration of trust and amendments thereto. Furthermore, all disbursements were upon specific order of the beneficiary (347). All moneys disbursed by Phoenix [764] Title and Trust Company were first received by it from sources which are provided for by the declaration of trust (348).

Further Cross-Examination.

By Mr. NEALON:

The disbursements for improvements exceeded the amount stipulated in the declaration of trust (348). Owens originally paid us $50,000. From this we paid $20,000 to Mrs. Barringer. That left $30,000 for the improvement fund. Within the next few days Dinmore and Mills paid to us $10,000, making the improvement fund $40,000. On June 22, 1929, Owens, Dinmore and Mills borrowed $19,000 from Phoenix Savings Bank & Trust Company. To secure this loan they assigned to the bank their rights under

exempt by law, for the benefit of its creditors. It prays that it be adjudged a bankrupt. Annexed to said petition, and filed as a part thereof, are the bankrupt's schedules, which are abstracted as follows: [766]

Schedule A (1)—Claims which have priority: "None".

Schedule A (2)—Creditors holding securities: "A promissory note executed by Thomas J. Tunney, December 20, 1928, payable to Margaret B. Barringer in the principal sum of $85,000, with seven percent interest from date of note, on which note there is now due the principal sum of $70,388.60, and interest in the amount of $3,782 to September 20, 1930. This note is secured by a mortgage on all of lots located in Windsor Square, according to the map thereof on file in the office of the County Recorder of Maricopa County, subject to the terms of a certain Declaration of Trust known as Trust No. 418 in the office of the Phoenix Title & Trust Company of Phoenix, Arizona; the payment of this note and mortgage has been assumed by petitioner,—$74,170.60".

Schedule A (3)—Unsecured claims: Various creditors mentioned in Trustee's Exhibit J are listed, together with their respective claims, aggregating $60,013.06.

Schedule A (4)—Liabilities on notes, etc.: "None".

Schedule A (5)—Accommodation paper: "None".

Schedule B (1)—Real estate: Lots involved in this proceeding are listed together with the follow-

ing statement: "The above real estate is subject to the terms of Trust No. 418 in the office of the Phoenix Title & Trust Company, and subject to the note and mortgage set forth in A-2".

Schedule B (2)—Personal property: "None".

Schedule B (3)—Choses in action: "None". [767]

Schedule B (4)—Property in reversion, remainder or expectancy: "See Schedule B-1".

Schedule B (5)—Property claimed as exempt: "None".

Schedule B (6)—Books, papers, deeds, etc. relating to bankrupt's business and estate: "All records of property owned by petitioner is in possession of Phoenix Title & Trust Co. of Phoenix, Arizona its trust No. 418".

All of said schedules are executed by Windsor Square Development, Inc., by L. D. Owens, Jr., its treasurer.

Thereupon, there was received in evidence Trustee's Exhibit C, which is in words and figures as follows:

"[Court and Cause.]

At Tucson, in said district, on the 28th day of October, A. D., 1930, before the Honorable William H. Sawtelle, Judge of said Court in Bankruptcy, the petition of Windsor Square Development, Inc., a corporation, that it be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard

and duly considered, the said Windsor Square Development, Inc., a corporation, is hereby declared and adjudged a bankrupt accordingly.

IT IS THEREFORE ORDERED, That upon the petition filed in this court by or against said bankrupt on the 25th day of October, A. D. 1930, said matter be referred to Hon. R. W. Smith, one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; [768] and that the said bankrupt shall attend before said Referee on the 10th day of November, 1930, at Phoenix and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said bankruptcy.

WITNESS the Honorable William H. Sawtelle, Judge of the said Court, and the seal thereof, at Tucson in said District, on the 28th day of October, A. D. 1930.

[Seal] C. R. McFALL,
Clerk.
By Richard S. Griffiths,
Deputy Clerk."

Said exhibit is endorsed "Filed Oct. 28, 1930, C. R. McFall, Clerk United States District Court for the District of Arizona, by Richard S. Griffith, Deputy Clerk", and a duly certified copy thereof was, on the 22nd day of November, 1930, recorded in the office of the County Recorder of Maricopa County, Arizona, in Book 42 of Miscellaneous Records at pages 466-467, at the request of Thos. W. Nealon.

Thereupon, there was received in evidence Trustee's Exhibit D, which is in words and figures as follows:

"[Court and Cause.]

CERTIFICATE ON ORDER APPROVING TRUSTEE'S BOND.

I, R. W. Smith, Referee in Bankruptcy, in charge of the above entitled matter, do hereby certify that the copy of [769] the Order Approving Trustee's Bond in the said matter, hereto attached, is a true and correct copy of said order made by me on the 15th day of November, 1930, and I further certify that the same is in full force and effect, and that George E. Lilley is the duly appointed, qualified and acting Trustee in Bankruptcy in the above entitled matter.

Given under my hand as Referee in Bankruptcy, this 15th day of November, 1930.

(Signed) R. W. SMITH,
Referee in Bankruptcy.

I, J. Lee Baker, Clerk of the United States District Court, for the District of Arizona, wherein the above matter is pending, do hereby certify that R. W. Smith is the duly qualified and acting Referee in Bankruptcy for the district, including Maricopa County, Arizona, and that his signature attached to the foregoing certificate is genuine.

Given under my hand and seal of this Court, this 17th day of November, 1930.

(Signed) J. LEE BAKER,
[Seal] Clerk of the Court.
(Signed) By H. F. SCHLITTLER,
Deputy.

"[Court and Cause.]

ORDER APPROVING TRUSTEE'S BOND.

[770]

It appearing to the Court that George E. Lilley, of Phoenix, County of Maricopa, State of Arizona, and District of Arizona, has been duly elected Trustee of the above named bankrupt, and given his bond with the American Bonding Company as surety for the faithful performance of his official duties in the amount fixed by the Order of this court, to-wit, in the sum of One Thousand Dollars ($1,000.00), it is

ORDERED that the said bond be and the same is hereby approved.

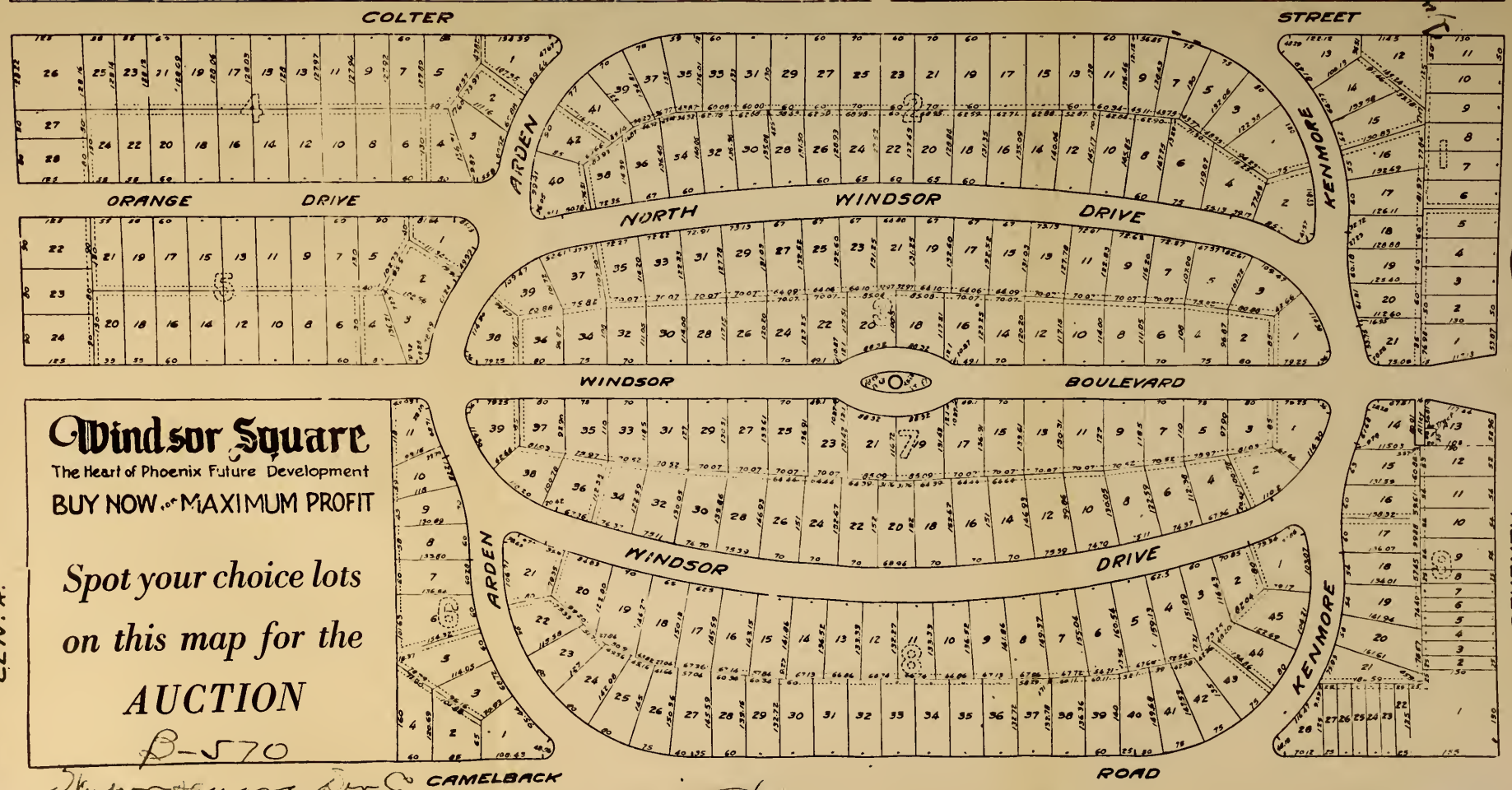
Dated this 15th day of November, 1930.

(Signed) R. W. SMITH,
Referee in Bankruptcy."

Said exhibit was, on the 18th day of December, 1930, at the request of Thomas W. Nealon, recorded in the office of the County Recorder of Maricopa County, Arizona, in Book 43 of Miscellaneous Records at pages 32 and 33.

Thereupon, there was received in evidence, as Trustee's Exhibit A, a plat of Windsor Square, which exhibit is in words and figures as follows:

TRUSTEE'S EXHIBIT A. [771]


COLTER
STREET
AVENUE
ARDEN
KENMORE
ORANGE
DRIVE
NORTH
WINDSOR
DRIVE
WINDSOR
BOULEVARD
Windsor Square
The Heart of Phoenix Future Development
BUY NOW for MAXIMUM PROFIT
Spot your choice lots
on this map for the
AUCTION
B-570
WINDSOR
DRIVE
CENTR.
SEVENTH
STREET
CAMELBACK
ROAD
Windsor Square Dev Co
Trustees exhibit
A
for identification
Trustees Exhibit
A
in evidence
Easement Line
Property Line
EASEMENTS
HOLMQUIST & MADDOCK
ENGINEERS

"Mr. NEALON: Now, we offer in evidence the claim of secured debts filed by Mrs. Barringer, number 19 of your Honor's record, with the same proviso, that we will substitute a certified copy thereof in place of the original (357).

Mr. MACKAY: I have no objection, your Honor. I take exception to counsel's designation of the character of that instrument. Of course, it will speak for itself (358)."

Thereupon, the instrument referred to was received in evidence as Trustee's Exhibit E.

TRUSTEE'S EXHIBIT E.

Said exhibit is in words and figures as follows:

"[Title and Cause.] In Bankruptcy
No. B-570 Phoenix

PROOF AND CLAIM OF LIEN.

At Phoenix, in said District of Arizona, on the ..... day of April, 1931, came Wm. H. MacKay of Phoenix, Maricopa County, Arizona, and made oath and says: That he is the authorized agent of Margaret B. Barringer, an individual, residing at Haverford, in the State of Pennsylvania; that on or about the 20th day of December, 1928, Thomas J. Tunney, of Phoenix, Maricopa County, Arizona, for value received, executed and delivered to said Mar-

garet B. Barringer, his certain promissory note, dated December 20th, 1928, payable in the principal sum of Eighty-Five Thousand ($85,000.00) Dollars; with interest thereon from date, at the rate of seven per cent (7%) per [772] annum, payable quarterly, together with interest on unpaid installments of interest at the rate of ten per cent (10%) per annum and attorneys' fees, which said promissory note is in words and figures as follows, to-wit: (here follows copy of note set out in Respondent Barringer's Exhibit No. 2).

That to secure payment of said promissory note, interest and attorney's fees, Phoenix Title and Trust Company, a corporation, for a good and sufficient consideration, executed its Declaration of Trust, dated January 9th, 1929, a copy of which Declaration of Trust is hereunto annexed marked 'Exhibit A' and by reference made a part hereof, and that thereafter, with the consent of said Margaret B. Barringer and said Thomas J. Tunney, said Phoenix Title and Trust Company, executed certain amendments to said Declaration of Trust, copies of which [773] amendments are hereunto annexed, marked 'Exhibit B' and 'Exhibit C', respectively, the lands in said Declaration of Trust being described as follows, to-wit:

> Lots One (1) to Ten (10), inclusive, and Lots Twelve (12) to Eighteen (18), inclusive, COLTER TRACT, according to the plat of

record in the office of the County Recorder of Maricopa County, Arizona, in Book 6 of Maps, page 35 thereof;

EXCEPT Tract thirty (30) feet East and West by twenty-five (25) feet West and South in the Southeast Corner of Lot Eighteen (18) (referred to as Lot Seven (7) in deed) COLTER TRACT, as more fully described in that certain deed to the S. R. V. W. U. A., recorded February 20, 1919, in Book 132 of Deeds, page 158, Records of Maricopa County, Arizona, and EXCEPT rights of way for canals, laterals and ditches.

Said property having been, pursuant to said Declaration of Trust, subsequently platted and subdivided as a subdivision under the name of "WINDSOR SQUARE", the plat whereof is recorded in the office of the County Recorder of Maricopa County, Arizona, in Book ..... of Maps, at page ..... thereof.

That said Thomas J. Tunney has failed to pay the installments of interest which, under the terms of said note, fell due quarterly during that period commencing March 20th, 1930, and ending September 20th, 1930, each inclusive, and that during the period commencing July 15th, 1930, and ending December 20th, 1930, said Margaret B. Barringer, for the purpose of preserving her said security pursuant to the provisions in said Declaration of Trust contained, advanced various sums of money, which,

together with interest on the respective items thereof from the date of their payment to November 5th, 1930, at the rate of eight per cent (8%) per annum, amounted to One Thousand Nine Hundred Sixty Two and 33/100 ($1,962.33) Dollars, all of which advances and interest were on November 5th, 1930, and now are wholly unpaid. [774]

That on November 5th, 1930, said Margaret B. Barringer, pursuant to the provisions in said Declaration of Trust and amendments thereto, duly declared the whole amount of said indebtedness, interest and advances, immediately due and payable and there was due on said 5th day of November, 1930, to her, the following sums to-wit:

Principal of note	$69,924.70
Installment of interest due 3/20/30	1,266.66
Interest thereon at 10% to 11/5/30	79.13
Installment of interest due 6/20/30	1,252.86
Interest thereon at 10% to 11/5/30	49.97
Installment of interest due 9/20/30	1,229.84
Interest thereon at 10% to 11/5/30	15.36
Adv. with interest at 8% to 11/5/30 Per Ex. 'F'	1,962.33
Total	$75,777.85

and said sums, together with interest thereon, at the rate of ten per cent (10%) per annum from November 5th, 1930, are now due and payable according to the terms of said promissory note, said Declaration of Trust and the amendments thereto.

That it is expressly provided in said promissory note and/or said Declaration of Trust and amendments thereto, said Margaret B. Barringer shall be entitled to recover in the event of suit, five per cent (5%) of the whole amount found due under said note and Declaration of Trust as attorney's fees, which said attorney's fee is, by the terms of said instruments, a lien upon said premises; that said Margaret B. Barringer employed an attorney who took all steps necessary for filing an action for the foreclosure of said mortgage in October, 1930, and that shortly thereafter said Windsor Square Development, [775] Inc., having theretofore acquired the beneficial interest of said Thomas J. Tunney, under said Declaration of Trust, as amended, filed its voluntary petition in bankruptcy, making it inadvisable for said attorneys to prosecute said action of foreclosure; that said Margaret B. Barringer thereafter employed attorneys for the purpose of securing a speedy sale of said premises by the trustee in said bankruptcy court, and said attorneys have performed services of great value, consuming a great part of said attorneys' time for the past six months, and said Margaret B. Barringer has become indebted to said attorneys for their services in a sum exceeding five per cent (5%) of the whole amount due under the terms of said promissory note and/or said Declaration of Trust as amended.

That all of those lots in said subdivision known and platted as 'Windsor Square' as hereinabove mentioned, are described on that schedule of lots

annexed hereto and marked 'Exhibit D', have never been released from said Margaret B. Barringer's lien and that there are contracts of sale deposited with said Phoenix Title and Trust Company pursuant to the terms of said Declaration of Trust and/or amendments thereto, for the sale and purchase of those certain lots described in 'Exhibit E' annexed hereto and made a part hereof, all of which said contracts of sale and all of which said lots (subject to the equity of the respective purchasers thereof) are subject to the lien of said Margaret B. Barringer, securing the indebtedness hereinabove mentioned.

That the lien of said Margaret B. Barringer upon the said premises described in 'Exhibit D' and 'Exhibit E', respectively, and upon the contracts of sale affecting lots described in said 'Exhibit E', is prior and superior to any right, title [776] and interest of said Windsor Square Development, Inc., the bankrupt corporation aforesaid in, to and upon the said premises described in 'Exhibits D' and 'E' respectively, and the contracts affecting lots described in said 'Exhibit E', and that all the right, title and interest of said bankrupt corporation in and to said property is subject, subservient and inferior to said Margaret B. Barringer's lien as aforesaid; that said Margaret B. Barringer claims, and by the filing of this instrument, intends to claim a first lien upon all of the premises described in said 'Exhibit D' and 'Exhibit E', respectively, and upon the said contracts affecting lots

described in said 'Exhibit E', and said Margaret B. Barringer hereby petitions the court to order that the said property and contracts which are subject to her lien as aforesaid, be sold for the purpose of satisfying her said indebtedness, advances, interest, attorneys' fees and costs, and for such other relief as may be meet and proper; that no part of said debt, advances, interest, costs or attorneys' fees has been paid and that there are no offsets or counterclaims to the same, and that Margaret B. Barringer has not, nor has any person by her order or to her knowledge, or belief of said deponent for her use, had or received any manner of security for said indebtedness whatever, SAVE AND EXCEPT the lien arising by virtue of the Declaration of Trust and amendments thereto hereinabove mentioned.

That this deposition is not made by the claimant in person because claimant resides outside of the State of Arizona, and deponent is better acquainted than claimant with the matters and things herein stated; and that deponent is duly authorized by his principal to make this deposition and that it is within his knowledge that the debt hereinbefore mentioned [777] was incurred and the said security was given as and for the consideration, and said creditor is constituted as hereinabove stated.

IN WITNESS WHEREOF, said agent of said creditor has hereunto signed his name and affixed his seal, when signing the deposition preceding, the 24th day of April, 1931.

(Signed) WM. H. MACKAY

(Testimony of Wm. H. Mackay.)

Subscribed and sworn to before me this 24th day of April, 1931. (Notary's signature and seal follows)."

Annexed to said Trustee's Exhibit E as exhibits "A", "B" and "C" thereof are copies of Respondent Barringer's Exhibits 2, 4 and 5, respectively. Annexed to said Trustee's Exhibit E are two lists of lots in Windsor Square (marked Exhibits "D" and "E", respectively) which in the aggregate describe the identical lots described in the Order and Decree Fixing and Marshalling Liens, etc., made by the Referee on September 17, 1932.

Thereupon, an instrument marked Trustee's Exhibit F was offered in evidence. It was stipulated that the instrument referred to is a true copy of an original instrument prepared by Mr. MacKay and served by him on Mr. Nealon. It was further stipulated that Mr. MacKay resisted the trustee's first application for an order of sale upon the grounds specified in the instrument referred to (357-360).

WM. H. MACKAY

called as a witness on behalf of the Trustee testified as follows:

At the hearing in this court last Spring upon a petition for an order of sale of real estate, I had in my possession the original instrument of which

(Testimony of Wm. H. Mackay.)

Trustee's Exhibit F is a copy. I handed Trustee's counsel a copy thereof either at the hearing or sometime previous thereto (361). I intended to [778] file the original but did not do so. I stated the substance of this instrument by way of objections to the entry of an order of sale. My recollection is that the application for sale was denied at that time and, probably for that reason, I did not file the instrument referred to (362).

Thereupon, the instrument referred to was received in evidence as

TRUSTEE'S EXHIBIT F

Said exhibit is in words and figures as follows, to-wit:

"[Title and Cause.]

In Bankruptcy—No. B-570—Phoenix

PETITION IN INTERVENTION AND OBJECTION TO SALE

Comes now MARGARET B. BARRINGER, and respectfully shows the Court as follows:

(1) That she is the owner of a lien securing at least Eighty-five Thousand ($85,000.00) Dollars upon those certain lots described in the bankrupt's schedule of assets, reference being hereby made to petitioner's proof and claim of lien heretofore filed herein for a more certain description of the amount of her lien and the security therefor;

(2) That it is petitioner's right to use the indebtedness secured by said lien in payment of the purchase money, if the property shall be sold at a

(Testimony of Wm. H. Mackay.)

judicial sale, and that until the amount of her said lien be judicially determined, the Honorable Referee is without authority to sell petitioner's security.

In re Saxton Furnace Company, 136 Fed. 697; [779]

In re Fayetteville Wagon-Wood & Lbr. Co., 197 Fed. 180;

In re Franklin Brewing Company, 249 Fed. 333;

In re Feeny Tool Company, 300 Fed. 379.

(3) Your petitioner further objects to any sale of her said security, pursuant to any order of sale which does not expressly authorize petitioner to bid thereat and in payment to apply the amount of her claim against the purchase price.

In re Waterloo Organ Co., 118 Fed. 904;

In re Saxton Furnace Co., supra;

In re Fayetteville Wagon-Wood & Lbr. Co., supra.

WHEREFORE, petitioner prays:

(1) That no order and/or order of sale be made until petitioner's lien be adjudicated;

(2) That petitioner's lien be adjudicated and that the Trustee and all persons contesting the validity or amount thereof be required to adjudicate the validity and amount of petitioner's lien before any action be taken by the Referee in the premises.

ELLINWOOD & ROSS
W. H. MACKAY
Attorneys for Petitioner,
Margaret B. Barringer."

(Testimony of Wm. H. Mackay.)

Thereupon, there was received in evidence Trustee's Exhibit G. Said exhibit is an order reading in words and figures as follows: [780]

"[Court and Cause.]

ORDER AUTHORIZING SALE OF REAL ESTATE FREE AND CLEAR OF ENCUMBRANCES AND DIRECTING ALL LIENS HELD BY ANY LIEN HOLDERS UPON SAID PREMISES TO BE TRANSFERRED TO THE PROCEEDS OF SAID SALE.

AT A REGULARLY CALLED MEETING of the creditors in the above entitled estate, held this 18th day of June, 1931, of which meeting due notice was given to all creditors of said estate, notifying said creditors that at said meeting that they should attend and consider the trustee's petition to marshal liens and sell property, described in said petition, free and clear of encumbrances, and transact such other business as might properly come before the meeting; and at said meeting the trustee's petition to marshal liens and sell property free and clear of encumbrances as hereinbefore mentioned having been duly presented to the court by the trustee in person and by his attorney, Thomas W. Nealon, and no objection being made by any creditors present to the making of such order of sale, or to the granting of trustee's petition to marshal liens;

And it appearing to the Court after due consideration of said trustee's petition and argument of

(Testimony of Wm. H. Mackay.)

Counsel thereon, that said petition should be granted and all proven liens [781] marshalled; and that such sale should be made free and clear of liens as aforesaid;

And it further appearing that the appraised value of the lands described in the trustee's petition was and is substantially in excess of any liens that might be existing thereon; and the court having, as prayed for in said petition, directed the making of service by order to show cause upon each of the parties named in the trustee's petition as claiming any liens or interest in said premises, and having issued an order to show cause directed to each of said persons to appear and show on a date named therein, what, if any, liens or claims the said alleged lien holders or claimants might have upon said premises, and having prescribed the form of service thereon and fixed the date upon which the said alleged lien holders should answer the trustee's petition and set up whatever liens or claims they might claim or hold, as September 2, 1931, and fixing the date of the hearing thereon as October 15, 1931;

And it further appearing to the Court that the appraised value of said property is $135,332.11 and that it would be to the interest of said estate, and protect as well the rights of any persons holding valid and subsisting liens against said real estate, that an upset price should be fixed in this order of sale;

(Testimony of Wm. H. Mackay.)

And it further appearing that seventy-five percent of the said appraised value would be a fair sum to fix for an upset price in such sale;

And it further appearing that it would be for the best interest of the estate and all parties in interest that [782] said property should be sold at private sale; free and clear of all encumbrances, as the same may be determined by this Court in their validity and order of priority, and that this court should make an order for the sale of said property at private sale, free and clear of such liens, either as a whole or in parcels, as shall seem to the best interest of said estate, and that any liens against said property which this court shall determine to be valid liens against said property prior to the time of said sale, and the date when said sale shall have been made or confirmed by this Court, should be transferred to the proceeds derived from the sale of said property in the order of priority determined by this Court;

NOW, at this meeting at which no adverse interest appears,

IT IS HEREBY ORDERED that said Trustee shall sell all of the lands described in his petition for sale, at private sale, free and clear of all encumbrances, either as a whole, or in part, as shall seem to the best interest of said estate, and an upset price of seventy-five per cent of the appraised value of said property is hereby fixed as the minimum at which said real estate shall be sold; and in the event of a sale of same in separate parcels, the 75% of the

(Testimony of Wm. H. Mackay.)

appraised value as shown by the appraisement on file in this Court is fixed as the minimum price for the sale of any of said parcels; and such sale or sales are to be duly reported to this Court by the trustee for confirmation or rejection.

IT IS FURTHER ORDERED that while the trustee may receive bids for the property described in the trustee's petition in accordance with this order, and if such bid or bids shall equal or exceed the upset price fixed herein, he shall [783] make return of sale thereof to this court, but there shall be no confirmation of such sale or sales until there shall have been a hearing upon the order to show cause directed to such claimants issued out of this court this day, unless same shall be consented to by those persons claiming liens upon said premises, and each of said claimants shall have an opportunity of bidding for said lands as herein provided.

AND IT IS FURTHER ORDERED that the petition of the trustee that the liens against said real estate be determined and marshalled, be granted and that the validity and priority be determined upon the hearing fixed in the order to show cause issued out of this court this day for that purpose; that said real estate is described as follows; all being situate in the County of Maricopa, State of Arizona, to-wit:

(here follows a list of the lots involved in this proceeding).

IT IS FURTHER ORDERED that any person or persons who shall be found to have a valid and

(Testimony of Wm. H. Mackay.)

subsisting lien upon said described lands at the hearing herein, and this day provided for may bid at said sale and apply such subsisting lien so found to be valid on the purchase price of said lands the same as if such liens were cash.

AND IT IS FURTHER ORDERED that any liens or claims against said property which this Court shall have determined to be valid liens against same, shall be transferred to the proceeds derived from the sale of said property in the order of priority determined by this Court, upon the hearing for that purpose this day ordered by this Court and after the service of order to show on the various parties interested directing them to appear and assert their claims as provided [784] in such orders to show cause.

DONE IN OPEN COURT the day and date first above mentioned.

(Signed) R. W. SMITH
Referee in Bankruptcy."

Said exhibit is endorsed "Received copy of the within Order Authorizing Sale, Free and Clear of Encumbrances, etc., this 30th day of June, 1931.

(Signed) ELLINWOOD & ROSS
Attorneys for Margaret B. Barringer."

"Mr. NEALON: Now, we offer in evidence the order appointing appraisers in this proceeding. I will offer the order and the appraisal together, if there is no objection.

Mr. MACKAY: And I will object to the appraisal if it is for the purpose of showing value of

(Testimony of Wm. H. Mackay.)

any of the property involved in this proceeding, for the reason that we have no opportunity to cross-examine the persons who placed the value upon the property thereunder.

The REFEREE: The objection is overruled.

Mr. MACKAY: An exception."

Thereupon, the instrument referred to was received in evidence as Trustee's Exhibit H, which exhibit is in words and figures as follows: [785]

"[Court and Cause.]

APPOINTMENT, OATH AND REPORT OF APPRAISERS

IT IS ORDERED That WALTER MARTIN, L. R. BAILEY and EBEN LANE, three disinterested persons be, and they are hereby appointed, appraisers to appraise the real and personal property belonging to the estate of said bankrupt, set out in the schedules now on file in this court, said appraisement to be made as soon as may be possible and the appraisers to be duly sworn

AND IT IS FURTHER ORDERED that said appraisers shall render their appraisement on each lot or parcel of real estate separately and not as a whole.

WITNESS MY HAND, this 16th day of December, 1930.

(Signed) R. W. SMITH
Referee in Bankruptcy

(Testimony of Wm. H. Mackay.)

State of Arizona,
District of Arizona.—ss.

Personally appeared the within named Walter Martin, L. R. Bailey and Eben Lane, and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

(Signed) WALTER MARTIN
(Signed) L. R. BAILEY
(Signed) EBEN LANE

Subscribed and sworn to before me this 18th day [786] of December, 1930.

(Signed) R. W. SMITH
Referee in Bankruptcy

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

		Dollars
The following lots in Windsor Square:		
Block 1:		
Lot No.	3	$ 440.00
	4	440.00
	5	370.00
	6	370.00
	7	440.00
	8	440.00

(Testimony of Wm. H. Mackay.)

	9	440.00
	10	750.00
	11	1000.00
	18	660.00
	19	660.00
Block 2:		
Lots No.	3	640.00
	4	900.00
	5	600.00
	6	800.00
	8	660.00
	10	660.00
	11	480.00
	12	660.00
	13	480.00
	15	480.00
	16	660.00
	17	480.00
	18	660.00
	19	480.00
	20	715.00
	21	560.00
	22	660.00

[787]

Lots No.	23	$ 480.00
	27	480.00
	29	480.00
	31	480.00
	32	660.00
	33	480.00
	34	660.00

(Testimony of Wm. H. Mackay.)

	36	725.00
	38	700.00
	41	552.00
	42	902.00
Block 3:		
Lot No.	2	725.00
	3	800.00
	4	800.00
	6	770.00
	7	750.00
	8	770.00
	9	775.00
	10	770.00
	11	775.00
	12	770.00
	13	800.00
	14	770.00
	15	737.00
	16	770.00
	17	737.00
	18	800.00
	19	737.00
	20	800.00
	23	737.00
	25	737.00
	26	770.00
	27	737.00
	28	770.00
	29	800.00
	30	770.00
	32	770.00

(Testimony of Wm. H. Mackay.)

	33		775.00
	34		770.00
	35		704.00
	36		770.00
	39		800.00
Block 4:			
Lot No.	3		720.00
	7		480.00
	8		660.00
	9		480.00
	11		480.00
	12		660.00
	13		480.00
	14		660.00
	15		480.00
	16		660.00
	17		480.00
	19		480.00
			[788]
Lot No.	20	$	660.00
	21		480.00
	25		660.00
	26		4,000.00
	27		1,250.00
	28		1,200.00
Block 5:			
Lot No.	3		700.00
	5		715.00
	6		572.00
	9		660.00
	11		660.00

(Testimony of Wm. H. Mackay.)

	13	660.00
	15	660.00
	16	660.00
	17	660.00
	19	600.00
	22	1,350.00
	23	1,100.00
Block 6:		
Lot No.	1	800.00
	3	660.00
	5	700.00
	7	660.00
	8	660.00
	9	660.00
	10	660.00
Block 7:		
Lot No.	2	800.00
	3	725.00
	4	800.00
	5	800.00
	6	775.00
	7	770.00
	9	770.00
	10	825.00
	11	770.00
	12	825.00
	13	770.00
	14	770.00
	19	800.00
	21	800.00
	27	770.00

(Testimony of Wm. H. Mackay.)

	29	770.00
	31	770.00
	33	770.00
	34	748.00
	35	770.00
	37	770.00
	38	825.00
Block 8, continued:		
Lot No.	1	900.00

[789]

Lot No.	2	$ 650.00
	3	650.00
	4	687.50
	5	687.50
	6	687.50
	7	687.50
	8	687.50
	10	687.50
	11	687.50
	12	687.50
	13	687.50
	15	687.50
	17	687.50
	18	715.00
	20	810.00
	22	800.00
	23	800.00
	30	660.00
	32	660.00
	33	660.00
	34	660.00
	35	660.00

(Testimony of Wm. H. Mackay.)

Block 8, contd.:		
	36	660.00
	37	660.00
	38	660.00
	39	660.00
	40	700.00
	41	685.00
	42	685.00
	43	625.00
	44	650.00
Block 9, continued:		
Lot No.	1	3,000.00
	3	750.00
	4	750.00
	5	750.00
	6	750.00
	7	750.00
	8	750.00
	10	475.00
	11	475.00
	12	465.00
	13	450.00
	14	880.00
	15	693.00
	16	572.00
	17	572.00
	18	594.00
	19	600.00
	20	600.00
	21	250.00
	Total—	$129,213.50

[790]

(Testimony of Wm. H. Mackay.)

Also the following lots in Windsor Square:

		Dollars
Block 2;	Lot 25	$ 560.00
3;	21	760.00
3;	31	790.00
4;	5	500.00
4;	10	660.00
6;	4	660.00
8;	25	700.00
8;	27	726.00
9;	24	750.00
9;	25	750.00
9;	27	750.00
	Total—	$7,606.00

[791]

Name	Lot	Block	Purchase Price	Principal Paid	Balance Due	Int. Paid to	
W. R. Wells,	2	1	$ 300.00	$ 75.00	$ 225.00	10-15-30	$ 225.00
Raymond L. Nier,	16	1	1300.00	328.10	971.90	11-25-30	600.00
J. Allen Wells,	22	3	975.00	450.00	525.00	11-10-30	525.00
E. L. Grose,	2	4	1675.00	613.24	1061.76	9-9-30	682.00
Glen E. Weaver,	24	4	1150.00	172.50	977.50	2-15-30	517.00
E. R. Foutz,	15	7	925.00	398.90	526.10	11-10-30	526.10
Lucille Nichols,	17	7	873.00	386.99	486.01	11-10-30	486.01
Nellie B. Wilkinson,	23 & 25	7	1200.00	100.00	1100.00	10-17-30	1100.00
E. R. Foutz,	26	7	1207.00	257.94	949.06	10-28-30	770.00
Susie M. Wallace,	9	8	1800.00	180.00	1620.00	9-3-29	687.50
			$11405.00	$2962.67	$8442.33		
						Total Value—	$6118.61

[792]

(Testimony of Wm. H. Mackay.)

Name	Lot	Block	Purchase Price	Principal Paid	Balance Due	Int. Paid to (Rate 8%)	
W. R. Wells,	1	1	$ 600.00	$ 247.50	$ 352.50	11-15-30	$ 352.00
Raymond F. Burke,	15	1	1350.00	202.50	1147.50	2-1-30	484.00
J. Dewey Solomon,	14	1	1200.00	295.57	904.43	2-3-30	680.00
F. T. Elder,	17	1	1600.00	631.67	968.33	10-15-30	670.00
W. R. Wells,	20	1	1094.00	269.21	824.79	11-15-30	650.00
K. E. Nash,	1	2	1575.00	576.07	998.93	10-27-30	900.00
James R. Heath,	35	2	1050.00	239.88	810.12	2-3-30	560.00
Olive Van de Car,	37	2	1500.00	366.41	1133.59	5-15-30	550.00
Anna Plainsted,	40	2	2250.00	480.05	1769.95	1-25-30	1150.00
Wm. J. Mullen,	1	3	2600.00	406.80	2193.20	9-24-29	900.00
John A. Sisson,	38	3	2600.00	565.10	2034.90	1-24-30	1000.00
E. L. Grose,	1	4	1775.00	868.56	906.44	9-20-30	700.00
Geo. B. Doubleday,	4	4	1750.00	175.00	1575.00	9-12-29	675.00
Rupert B. Brady,	6	4	1675.00	439.84	1235.16	1-30-30	660.00
Carrie M. Riddy,	18	4	1650.00	282.05	1367.95	1-12-30	660.00
August Johnson,	22	4	1600.00	414.61	1185.39	1-5-30	605.00
J. M. Kellogg,	23	4	1100.00	798.45	301.55	9-25-30	301.55
Marjorie Van Ryder,	1	5	2400.00	445.00	1955.00	10-20-29	900.00
T. J. Dowdy,	2	5	1850.00	289.46	1560.54	9-14-29	850.00
Henrietta Dawson,	4	5	1850.00	796.58	1053.42	10-1-30	600.00
S. S. Stork,	10	5	1650.00	234.77	1415.23	11-6-29	660.00

Name	Lot	Block	Purchase Price	Principal Paid	Balance Due	Int. Paid to (Rate 8%)	
Bill Jones,	20	5	$ 1275.00	$ 420.44	$ 854.56	4-3-30	$ 517.00
W. C. Kempton,	21	5	1400.00	535.63	864.37	11-22-30	517.00
Wm. J. Mullen,	11	6	2000.00	523.18	1476.82	9-6-29	725.00
John Luper,	24	7	1298.79	534.57	764.22	11-15-30	764.22
Myrtle A. Thomas,	28	7	1975.00	1714.96	260.04	11-20-30	260.04
Murel T. White,	30	7	1950.00	564.44	1385.56	7-3-30	825.00
Nina Banks,	14	8	1800.00	360.00	1440.00	9-15-29	687.50
						applied 35.00	
							[793]
Dorothy Berndt,	21	8	2500.00	250.00	2250.00	9-9-29	1000.00
Nellie Sult,	24	8	1850.00	970.72	879.28	11-20-30	750.00
Geo. Babbitt, Jr.,	26	8	1800.00	259.44	1540.56	8-21-29	700.00
Pearl Scherman,	29	8	1650.00	682.03	967.97	5-8-29	660.00
Etta Beamer,	31	8	300.00	68.33	231.67	11-20-30	231.67
Chas. D. Long,	45	8	1850.00	451.85	1398.15	2-30-30	800.00
Ada B. Paul,	2	9	1500.00	192.14	1307.86	11-3-29	750.00
Geo. W. Mulholland,	9	9	1200.00	280.19	919.81	11-18-29	475.00
Louis T. Pierce,	23	9	1500.00	256.40	1243.60	10-16-29	750.00
Arthur Peterson,	26	9	1500.00	300.00	1200.00	6-12-29	750.00
			$62067.79	$17389.40	$44678.39		
						Total Value—	$25,670.48
							[794]

(Testimony of Wm. H. Mackay.)

Deposit with Central Arizona Light & Power Company, for extension service

Value $2727.42

[795]

Note:

The valuation of $3000.00 placed on Lot 1, Block 9, is fixed on a basis of present condition of lot on which is located a well of the S. R. V. W. U. Assn.

SUMMARY.

Total value lots	$136,819.50
" " contracts	31,789.09
Deposit with Central Arizona Light & Power Company,	2,727.42
Total Value, all property,	$171,336.01

IN WITNESS WHEREOF we hereunto set our hands, at Phoenix, this 10th day of January, 1931.

(Signed) Walter Martin
(Signed) L. R. Bailey
(Signed) Eben Lane."

Said exhibit is endorsed "Filed January 12, 1931, R. W. Smith, Referee."

TOM MADDOCK

called as a witness for the Trustee in Bankruptcy testified as follows:

I am an engineer and have been engaged in that profession for 31 years. I have had some experience in connection with the laying out of subdivisions of real estate and the engineering features of improvements thereon. I am a member of the firm of Holmquist and Maddock, and our partnership staked [796] out the subdivision of Windsor Square and subsequently had charge of the engineering and supervision of the construction that was done out there. We supervised the putting in of the improvements. My recollection is that we started in the early part of 1929 and continued something short of a year.

"Mr. NEALON: Can you tell us what improvements were put in that subdivision under the supervision of your partner and yourself? [797]

Mr. MACKAY: I object to that on the ground that the question is irrelevant, immaterial, and incompetent for any purpose whatever, and not within the issues raised in this proceeding.

The REFEREE: The objection will be overruled.

Mr. MACKAY: An exception.

The WITNESS: Yes, sir.

Mr. NEALON: Please tell them to the court, Mr. Maddox.

The WITNESS: Can I refer to notes of what they were?

(Testimony of Tom Maddock.)

Mr. NEALON: Yes, for the purpose of refreshing your memory you may.

The WITNESS: I could not possibly remember it otherwise. Do you want all of the items?

Mr. NEALON: Yes. I prefer the details. if you please.

Mr. MACKAY: May the record show our objection to all questions touching upon the time of installation and the extent of the improvements in Windsor Square, on the ground they are irrelevant, incompetent and immaterial for any purpose. and incompetent for the purpose of showing any title in the bankrupt or its predecessors in interest.

The REFEREE: It may, and the ruling will be that the objection will be overruled.

Mr. MACKAY: An exception.

The WITNESS: There was some original work there clearing and leveling the land, ditching it and so forth done by Mr. O. F. Fisher. That amounted to $685.92. A well was sunk about 450 feet deep. It cost $2,350. It was done by a [798] man by the name of Garrison. The water pipe line system was put in by Mr. Fisher and cost $12,177.48.

Mr. MACKAY: May I interrupt just a minute? When you say it was put in by Mr. Fisher, do you mean that he was the contractor in charge of that or the person who had it put in?

The WITNESS: It was all done under our direction. We were getting a percentage for superintending and engineering the construction features.

(Testimony of Tom Maddock.)

These bills that I am giving you so far went through our office and were approved by us before they were paid or handled by the firm. I have three additional bills—the actual bills did not go through our office, but we got the items in order to compute our percentage upon which we submitted a bill to the firm.

Mr. MACKAY: Well, when you say Fisher did a particular piece of work do you mean he was the man who actually performed the work rather than the man who had his own property improved?

The WITNESS: Oh, yes, they were either straight contract jobs or force account jobs. Some were force account jobs, in which case we checked his timekeeper's cost sheets and approved them and they went into the firm.

Mr. MACKAY: Thank you.

Mr. NEALON: You may proceed, Mr. Maddox.

The WITNESS: Did I give you that order—will you read the last of my statement there, please, Mr. Reporter?

(Thereupon the last statement of the witness was read aloud, as requested, as follows)

"The water pipeline system was put in by Mr. Fisher and cost $12,177.48." [799]

The WITNESS: Sidewalks and curbs $19,246.68. Electric light standards sixty-four ninety-eight.

Mr. NEALON: You mean $6,498?

The WITNESS: Yes, sir.

Mr. NEALON: Pardon me.

The WITNESS: Electric light wiring, $3,169.03. The entrance posts for lights and so forth to those

(Testimony of Tom Maddock.)

streets was $696. Installing of pump, tanks, motors, and so forth, $2,692. Arizona Sand and Rock Company, for sand and rock for paving, $11,784.91 Force account on paving work to Fisher, $24,246.20. Central Arizona Light and Power, $1,751.80. The same firm $1,480. Those items total $86,728.02. To which would be added our five per cent commission of $4,336.40. We did some additional work on the survey and laying out of the project, amounting to $1,328.26. The total items I am giving you here, $92,392.68. All of those bills went through our office except the Electric Light and Power Company, and one for the electric light standards. But we also looked after that work. It just happened the bills didn't go through us so I had to find out what those bills were from the people who did the work.

Mr. NEALON: Was the work done then?

The WITNESS: Oh, yes. The only thing, the other items I am absolutely sure of, and these I got from three parties who paid us our percentage of supervision upon them. They went in and were handled direct.

Mr. NEALON: Now, the figures you have given do not include shrubbery and certain other improvements there, do they?

The WITNESS: I don't know what you mean by "certain other" but they do not include shrubbery, trees, or anything like that. [800]

Mr. NEALON: Were there any other improvements that you know of made there other than those to which you have testified, Mr. Maddox?

(Testimony of Tom Maddock.)

Mr. MACKAY: I object to the question unless it is made more specific as to when and by whom.

Mr. NEALON: I am just asking him if he knows now.

The WITNESS: I think that is all I know anything about, unless they were made subsequently.

Mr. NEALON: Now, what in your opinion was the value of those improvements as compared with the cost thereof?

The WITNESS: I think their work was done remarkably cheap. I think all of it was—I doubt if even under the depression it could be contracted for today any cheaper than it could have been or than the force account work was done for at that time.

Mr. NEALON: With whom did you contract for your services?

The WITNESS: With Owens and Dinmore.

Mr. NEALON: Who was in possession of the contract at the time you made these improvements?

Mr. MACKAY: I object, your Honor, on the ground that it is irrelevant, immaterial and incompetent, and that possession is no basis for proof of title in the bankrupt or his predecessors.

The REFEREE: The objection will be overruled.

Mr. MACKAY: An exception.

The WITNESS: You mean physically, or legally, judge?

Mr. NEALON: Physically.

(Testimony of Tom Maddock.)

The WITNESS: We were dealing with Owens and Dinmore. They were apparently in charge of the work. They told [801] us to go ahead and lay it out and see that the work was done. I presume they were in possession of it. I don't know.

Mr. MACKAY: I move to strike out the answer of the witness. The witness says that he presumes but he does not know it.

The REFEREE: Yes, what is presumed may be stricken.

Mr. NEALON: Well, as to the physical possession, who was in possession?

The WITNESS: The physical possession?

Mr. NEALON: Yes.

The WITNESS: (There was no answer)

Mr. NEALON: I mean by that, Mr. Maddox, who was in charge of the property directing——

The WITNESS: (Interposing) Directing us?

Mr. NEALON: Yes.

The WITNESS: Owens and Dinmore.

Mr. NEALON: What individuals came out there and gave any directions or requests or made any changes in the work?

The WITNESS: I think the only one would have been Mr. Owens, for sure, and I doubt if Dinmore ever made a suggestion. He came out there sometimes but I don't recall any suggestions that he made."

The WITNESS (Resuming): We received payments for our work from Owens and Dinmore. I don't think I ever met Mrs. Barringer, but I have been present at meetings at the Phoenix Title and

(Testimony of Tom Maddock.)

Trust Company when Mr. Taylor of the Title Company and Mr. Gene Cunningham were present and additional times when Mr. Dinmore was present. These conferences took place at the time negotiations were going on with Mr. Gene Cunningham in regard to refinancing the Windsor Square property. I was with [802] Mr. Taylor and Mr. Gene Cunningham back and forth between their offices and Mr. Beach a half dozen times and over a period of maybe a couple of weeks. These conferences must have been about May or June of 1930. I probably could get the date from correspondence I have. I, myself, had an account against the Owens-Dinmore people at that time, and the matter of that particular indebtedness was brought up at every conference. There was a discussion of the debts that would have to be paid and taken over or taken up if they were going to take over the property, and there was an effort to see what bills could be postponed at that time. The discussion arose over the question of the minimum amount of cash necessary to handle the proposition. At this time there was approximately $1400 due to us. Mr. Owens paid us one check of $250 along about that time; a little before or a little after. If that amount had been paid at the time of these conferences, the amount due us would have been around $1400. If not, it was more than that—that difference. To a limited extent I am familiar with improvements

(Testimony of Tom Maddock.)

put in various subdivisions, and I believe I am competent to pass upon the value of paving and sidewalks. As an engineer, I supervised the putting in of the pavement and other improvements on this property.

"Mr. NEALON: What, in your opinion, was the value added to the lots in Windsor Square by reason of the improvements so put in? I mean the average increase in the value per lot by reason of the improvements.

Mr. MACKAY: I object to that on the grounds that the question is irrelevant, incompetent, and immaterial for any purpose whatsoever. It is outside of the issues involved in this proceeding. [803]

Mr. NEALON: If your Honor please, counsel went very urgently and strenuously into the matters of values out there to demonstrate this property would not bring $50,000.

The REFEREE: Yes.

Mr. NEALON: Now, the testimony that I am seeking to bring out from this witness is a recognized criterion to be taken into consideration in establishing values of real estate.

The REFEREE: Yes. The objection is overruled.

Mr. MACKAY: An exception.

The WITNESS: Why, the number of lots divided into the amount expended would give the amount per lot. Some lots are larger than others, therefore, the value of the improvements greater;

(Testimony of Tom Maddock.)

the water cost is fairly equally divided, the lighting, and so forth. I think if you would take your $92,000 and divide it by the number of lots you would get an approximate figure.

Mr. NEALON: At the time of these conversations about the refinancing of the corporation were or were not Owens-Dinmore able to meet their obligations as they matured?

The WITNESS Resuming: During the time of these conversations about refinancing, Owens and Dinmore stated they were very hard up at the time and were endeavoring to raise funds from other sources to carry on the work. They met their indebtedness to us as it came due by finally making an arrangement by which they transferred the title of a couple of lots to us in final payment."

Cross Examination by Mr. MacKay.

While the street improvements were being made a few houses were erected and people were living therein. Mr. Owens [804] had a house, as did Mr. Dinmore. Construction of these two houses was going on simultaneously with the street construction. Neither Mr. Owens nor Mr. Dinmore lived on the tract (379).

Redirect Examination by Mr. Nealon.

A voluntary crop of hay came up on the tract in the Spring of 1929.

"Mr. NEALON: Who harvested the hay and took possession of it?

(Testimony of Tom Maddock.)

Mr. MACKAY: I object on the ground it appears from the declaration of trust that has been introduced in evidence herein that no one is entitled to possession of the premises referred to except the Phoenix Title and Trust Company, except for certain purposes, one of which is not to occupy the land to harvest hay.

Mr. NEALON: The purpose, if your Honor please, is to show the physical act of possession.

The REFEREE: Yes, I know the purpose of it. Of course, while it is not clearly within the issues, it is within the issues of this hearing as given heretofore, so it will be permitted.

Mr. MACKAY: An exception." [805]

The WITNESS: Mr. Owens made an arrangement with the man to cut the hay because it made the property look like a farm instead of a subdivision (380).

Re-cross Examination by Mr. MacKay.

Cutting the hay improved the appearance of the lots (381).

W. M. SMITH

called as a witness on behalf of the Trustee testified as follows:

I am Clerk of the Referee's court and held that position on June 8, 1931 (381). One of my duties is to send out notices of the meetings of creditors.

(Testimony of W. M. Smith.)

The instrument handed to me by counsel is a copy of a notice which I mailed to the creditors of the bankrupt on June 18, 1931. On June 8, 1931, I mailed a copy of said notice to Margaret B. Barringer, c/o Wm. H. MacKay, Attorney, Phoenix.

Said notice reads in words and figures as follows, to-wit:

"In the District Court of the United States, for the District of Arizona. In the Matter of Windsor Square Development, Inc., a corporation, Bankrupt. Notice in Bankruptcy, No. B-570-Phx.

To the Creditors of the Above Named Bankrupt:

Notice is hereby given that on the 18th day of June, 1931, at 2:00 in the afternoon, a meeting of the creditors of the above named bankrupt will be held at my office No. 315 Ellis Building, in the City of Phoenix, Arizona, at which time the creditors may attend, consider Trustee's petition to marshall liens and sell property free and clear of encumbrances, and transact such other business as may properly come before the [806] meeting. Phoenix, Arizona, June 8th, 1931.

(Signed) R. W. SMITH, Referee in Bankrupty." (383a)

"Mr. NEALON: Now, we offer in eivdence the petition of appraisers for compensation.

Mr. MACKAY: I will object to it on the grounds it is incompetent, irrelevant, and immaterial."

(Testimony of W. M. Smith.)

Thereupon, the instrument referred to was received in evidence as Trustee's Exhibit I, which exhibit is in words and figures as follows, to-wit:

"(Court and Cause.)

PETITION OF APPRAISERS FOR COMPENSATION.

To the HONORABLE R. W. SMITH, Referee in Bankruptcy:

Your petitioners herein respectfully represent to the court as follows:

That on the 16th day of December, 1930, they were by order of this court appointed appraisers to appraise the real and personal property belonging to the estate of said bankrupt, and that on the 18th day of December, 1930, they took their oath as such appraisers and entered upon their duties.

Your petitioners show to the court that, as will appear from the schedules of the bankrupt herein, and the report of said appraisers duly made herein on the 10th day of [807] January, 1931, a large part of the property belonging to said bankrupt estate consists of real estate, being the unsold portion of a certain subdivision to the City of Phoenix, Arizona, known as Windsor Square; that a number of lots in said subdivision, as will appear from the schedules of said bankrupt, had been sold under conditional sales contract, and that a large portion of said lots in said subdivision remained unsold; that it was therefore necessary for your appraisers in order to make such appraisement of the prop-

(Testimony of W. M. Smith.)

erty as would assist in the administration of said estate to make an appraisal and place the valuation separately upon each and every of the lots in said Windsor Square belonging to said bankrupt estate, or in which said bankrupt estate had an equity.

That in pursuance of their duties as such appraisers, and in order to property appraise said property, it was necessary for your petitioners to devote a considerable time to securing maps of said subdivision, obtaining data from engineers and others as to the cost, as well as the value of paving and other improvements heretofore placed on said subdivision, and to expend a great deal of time in working out a scientific system of appraisal of said different lots in said subdivision, based upon the location, frontage, value of improvements already placed on said lots, or contiguous thereto, and various other considerations, such as possibility of utilization of certain of said lots for business purposes and of others for residence purposes.

That all of the above entailed much labor on the part of your petitioners, and that in carrying out such appraisal in accordance with the order and directions of this court, they devoted to this work approximately five days of actual time. [808]

That your petitioners believe that the sum of One Hundred ($100.00) Dollars is a reasonable amount of compensation for each of them for the work done by them in pursuance of orders of this court, and therefore respectfully petition this court that an allowance of One Hundred ($100.00) Dollars be

(Testimony of W. M. Smith.)

made to each of said appraisers as and for compensation for their services in making and returning said appraisement.

Dated at Phoenix, Arizona, this 12th day of February, 1931.

(Signed) WALTER MARTIN
(Signed) EBEN E. LANE
(Signed) L. R. BAILEY
Petitioners.

United States of America,
State of Arizona,
County of Maricopa—ss.

WALTER MARTIN, L. R. BAILEY and EBEN LANE, the petitioners above named, being severally duly sworn, each for himself, and not one for the other, doth depose and say:

That he has read the above and foregoing petition, and that the matters therein stated are true in substance and in fact.

(Signed) WALTER MARTIN
(Signed) EBEN E. LANE
(Signed) L. R. BAILEY

Subscribed and sworn to before me this 13th day of February, 1931.

(Signed) Rossa Lenson
Notary Public

My commission expires Oct. 19, 1934.
(Seal)"

Said exhibit is endorsed "Filed February 10, 1931, R. W. Smith, Referee." [809]

(Testimony of W. M. Smith.)

Thereupon, Schedule A (3) of the bankrupt's amended schedules was received in evidence (over Respondent Barringer's objections as to competency, relevancy and materiality) as

TRUSTEE'S EXHIBIT J.

Said Schedule A (3) was filed December 15, 1930, and verified by Len D. Owens, Jr., as treasurer, and lists the claims of unsecured creditors in words and figures as follows, to-wit: [810]

	$ Cts.
"Pratt-Gilbert Co. of Phoenix, Ariz. Open account, for merchandise bought at Phoenix, Ariz. in 1929.	2.30
Arizona Sand & Rock Co. of Phoenix, Ariz. for gravel hauled in the year 1929, on open account.	10.00
Central Arizona Light & Power Co. of Phoenix, Ariz. for labor furnished in the year 1929, on open account.	18.65
B. J. Jarrett Hardware Co. of Phoenix, Ariz. for hardware purchased on open account in the year 1929.	1.22
Arizona Republican Engraving Co. of Phoenix, Ariz. for advertising furnished in the year 1929, on open account	34.79
Arizona Republican, of Phoenix, Arizona, for advertising furnished in the year 1929 on open account.	900.57
Myers-Leiber Co. of Phoenix, Arizona, for signs furnished in the year 1930 on open account.	247.50

(Testimony of W. M. Smith.)

Gazette Job Printing Co. of Phoenix, Arizona, for printing in the year 1930 on open account. 213.15

Schmidt & Hitchcock Inc. of Phoenix, Arizona, for use of machinery and labor, in the year 1939 on open account. 125.00

Dorris-Heyman Furniture Co. of Phoenix, Arizona, for furniture, bought in the year 1929 on open account. 34.28

Warners Delivery Service, of Phoenix, Arizona, for delivery service in the year 1929 on open account. 17.50

Norman Nursery, of Phoenix, Arizona, for trees furnished on open account in the year 1929. 345.57

Hammond McFarland Lumber Co. of Phoenix, Arizona, for lumber furnished on open account in the year 1929. 136.65

total ..... $ 2087.18

continued on next page. [811]

Amended Schedule A (3) continued.

Gazette Publishing Company of Phoenix, Ariz., Advertising, furnished in the year 1929, on open account. $ 491.60

Elliott & Snell, of Phoenix, Ariz., for legal services, furnished in the year 1929, on open account. 275.00

Kibbey, Bennett Gust & Smith of Phoenix, Ariz. for legal services furnished in the year 1930 on open account. 250.00

Dwight B. Heard Investment Co. of Phoenix, Ariz. management services, in the

(Testimony of W. M. Smith.)

All the above claims listed in this schedule were incurred for materials and services equal in value to the amounts listed, at Phoenix, Arizona, and are not evidenced by note, judgment or bond.

George Bennett, of Los Angeles, Calif., for money borrowed about the month of October, 1929, and used in improvement of Windsor Square	$3000.00
J. P. Atkin, of Los Angeles, Calif., for money borrowed about the month of October, 1929, and used in the development and improvements on Windsor Square.	13500.00
F. M. Hill, of Los Angeles, Calif., for money borrowed about the month of October, 1929, and used in the development and improvements on Windsor Square.	19000.00
L. D. Owens Sr. of Aetna Springs, Calif., for money borrowed about the month of October, 1929, and used in the development of Windsor Square.	6500.00
Nancy Moale, of Petaluma, Calif., for money borrowed about the month of October, 1929, and used in the development of Windsor Square.	1350.00
Total.	$47453.78''

[812]

(Testimony of W. M. Smith.)

Thereupon, there was received in evidence as

TRUSTEE'S EXHIBIT K.

schedule B (1) of bankrupt's amended schedule filed December 15, 1930. It lists as the property of the bankrupt one hundred and eighty-two lots in Windsor Square, all involved in this proceeding, together with twelve additional lots, all of an estimated value of $270,000.

At the suggestion of the Referee, for the purpose of saving time, it was stipulated by counsel that exceptions to rulings of the Referee need not be expressly saved and that whenever an objection is overruled an exception is deemed saved in these proceedings (390).

Threupon, there was received in evidence (over the objection of Respondent Barringer as to its competency, relevancy and materiality) a schedule of unsecured claims of creditors as Trustee's Exhibit L.

TRUSTEE'S EXHIBIT L.

Said exhibit is original schedule A (3) filed by the bankrupt and verified by Len D. Owens as Treasurer. It lists the claims of twenty-five unsecured creditors aggregating $40,013.06 but erroneously totalled on the exhibit at $60,013.06.

(Testimony of L. J. Taylor.)

Thereupon, it was stipulated by counsel that the allegations, contained in the answer filed by Salt River Valley Water Users' Association, are true.

L. J. TAYLOR

recalled as a witness for the Trustee testified as follows:

Direct Examination by Mr. Nealon.

I have prepared a statement of the handling, since [813] bankruptcy, of funds by Phoenix Title and Trust Company under the Declaration of Trust.

The witness produced the instrument referred to. Thereupon, it was received in evidence as

TRUSTEE'S EXHIBIT M.

Said exhibit is in words and figures as follows, to-wit:

(Testimony of L. J. Taylor.)

		(Release	83.24
		(Bank	2148.82
		(Collection fees	9.00
"Balance on hand 10-28-30	2404.58—	(Improvement Fund	43.90
		(Special Fund	18.00
		(Incomplete	88.96
		(Miscellaneous	12.66
		(Commissions	468.51
		(Release	1886.15
		(Bank	5119.01
		(Collection fees	135.42
Receipts 10-28-30 to 12-1-31	9302.01—	(Taxes	6.67
	———	(Taxes	629.64
	11706.59	(Improvement Fund	200.47
		(Miscellaneous	856.14
		(Commissions	450.00
		(Bank	7032.11
		(Taxes	647.99
		(Bank Expense	115.00
Distribution 10-28-30-12-1-31	9350.32	(Collection fees	133.58
	———	(Policy Charges	42.00
	2356.27	(Trust Service	110.00
		(Miscellaneous	819.64
			———
			9350.32
		(Release	2034.64
		(Bank	126.72
		(Collection fees	.28
On hand 12-1-31	2356.27—	(Improvement Fund	188.63
		(Special Fund	6.00
			———
			2356.27"

The WITNESS Resuming: I have also prepared under my signature a statement showing what lots in Windsor Square have been conveyed by Phoenix

(Testimony of L. J. Taylor.)

Title and Trust Company, Trustee, subsequent to October 25, 1930. [814]

The witness produced the instrument referred to. Thereupon, it was received in evidence as Trustee's Exhibit N.

TRUSTEE'S EXHIBIT N.

Said exhibit is in words and figures as follows:

"I, L. J. TAYLOR, Trust Officer, of the Phoenix Title and Trust Company, hereby certify that the following statement shows all of the lots in WINDSOR SQUARE which have been conveyed by the Phoenix Title and Trust Company, Trustee, subsequent to October 25, 1930, as follows:

Lot	Block	Grantee	Date of Deed	Remarks
2	1	W. R. Wells	December 4, 1930	This lot was subject to the Barringer lien and was deeded on completion of payments.
19	8	Arthur E. Larsen	Oct. 27, 1930	This lot was subject to the Barringer lien and was deeded on completion of payments.
28	7	Myrtle Ada Thomas	July 31, 1931	This lot was included in those assigned to Phoenix Savings Bank and Trust Company; deed made on completion of paypayments.

(Testimony of L. J. Taylor.)

Lot	Block	Grantee	Date of Deed	Remarks
16	8	Marguerite Haustgen	Nov. 9, 1931	This lot was included in those assigned to Phoenix Savings Bank; credit authorized by Bank and deed made on completion of payments less credit.
31	8	Etta Beamer	Oct. 4, 1931	This lot was included in those assigned to Bank; deed made on completion of payments.

[815]

15	1	Geo. E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development Inc., an Arizona corporation	July 28, 1931)	These lots were deeded on the joint order of Phoenix Savings Bank & Trust Company and the Trustee in Bankruptcy, pursuant to order of sale issued out of bankruptcy court.
14	1	"	")	
40	2	"	")	
1	3	"	")	
38	3	"	")	
10	5	"	")	
14	8	"	")	
21	8	"	")	
9	9	"	")	

Phoenix, Arizona, November 27, 1931.

(Signed) L. J. Taylor
Trust Officer."

(Testimony of L. J. Taylor.)

The WITNESS Resuming: I do not have in my possession any written authority from Messrs. Owens, Dinmore, Mills and their wives authorizing Mr. Tunney to act as their agent in signing any instruments concerning real estate. I have in my custody a written instrument under which Owens-Dinmore Company, executed by L. D. Owens, Jr., authorized the payment of $20.00 to Tunney for his services for signing the note and Declaration of Trust. Said instrument reads as follows, to-wit:

"To L. D. Owens, Junior, et al:

There is due to Owens-Dinmore Company a commission of $2,625, from said commission you are hereby authorized and instructed to deduct the following amounts: $225, being one-half of the title cost charge; $150 acceptance fee on trust; $2.55 recording fee on deed; $20 to Mr. Tunney for services; $397.55 all told. The total amount to be paid to Owens-Dinmore Company, therefore, is $2,227.45.

Owens-Dinmore Company, by L. D. Owens, Junior."

Said instrument is dated January 12, 1929. I also have in my custody lengthy written escrow instructions, dated December 21, 1928, signed by Mrs. Barringer, Mr. Barringer, [816] E. J. Bennitt, Owens-Dinmore Company and Thos. J. Tunney (397). These instructions are addressed to Phoenix Title and Trust Company. They were not signed

(Testimony of L. J. Taylor.)

by the wives of Owens, Dinmore or Mills (398). I have no such instrument signed by the wives, but I have written instructions from the wives signed by all the other parties, that we may take the instructions of Mr. Owens without any further authorization from anyone else being necessary.

Thereupon, the escrow instructions referred to were offered in evidence. Objection was made by Respondent Barringer to reception of the instrument referred to. Thereupon, Mr. Nealon withdrew the offer (399).

"Mr. MACKAY: I move that the testimony of Mr. Taylor to the effect that he has in his possession such an instrument which is not signed by the wives of Owens, Dinmore, and Mills, be stricken.

The REFEREE: Well, it might affect some other instrument, from its nature. It may stand."

The WITNESS Resuming: There is annexed to Respondent Barringer's Exhibit No. 13 the printed form of deed used by Phoenix Title and Trust Company, as Trustee, in conveying lots in Windsor Square.

It is stipulated by counsel that Trustee's Exhibit A is a correct copy of the plat of Windsor Square recorded in the office of the County Recorder of Maricopa County, Arizona.

The WITNESS Resuming: Phoenix Title and Trust Company handles many subdivisions in and around Phoenix.

(Testimony of L. J. Taylor.)

"Mr. NEALON: And in many of these subdivisions you take a warranty deed direct to the Phoenix Title and Trust Company [817] upon a printed form the same as is shown in Respondent Barringer's Exhibit No. 1 in evidence? (404)

Mr. MACKAY: I object to the question on the ground it is immaterial what the Phoenix Title and Trust Company does in their transactions not before the Court.

Mr. NEALON: The question is preliminary, if your Honor please.

The REFEREE: Well, it may stand.

Mr. MACKAY: Exception.

The WITNESS: Yes, this is the form on which we take titles to the Phoenix Title and Trust Company as Trustee.

Mr. NEALON: Many of those subdivisions have no mortgage or incumbrance upon them at the time you take title?

Mr. MACKAY: The same objection.

The REFEREE: The same ruling.

Mr. NEALON: Do they not?

Mr. MACKAY: An exception.

The WITNESS: They have no mortgage, a good many of them have not, but the vast majority of them have.

Mr. NEALON: And in those it is your practice, is it not, to incorporate into the deed itself the notation as to the mortgage?

(Testimony of L. J. Taylor.)

The WITNESS: No, not if it is to be handled under a trust like this (405). I was in the employ of Phoenix Title and Trust Company when the trust on the Buroughs' Addition was taken. If there was a mortgage on the property at the time we took title, such mortgage would show as an exception to the title.

Mr. NEALON: If there was a recorded mortgage as against any property (406) that you were handling as a subdivision and you took the deed to it, you would put such a recitation to the deed to you, would you not?

Mr. MACKAY: I object to the question on the ground that the practice of the Title Company in respect to other subdivisions [818] and taking title thereto is wholly immaterial.

The REFEREE: The objection is overruled.

Mr. MACKAY: An exception.

The WITNESS: Why, if the mortgage was on there at the time we took it, naturally.

Mr. NEALON: Mr. Taylor, do you know anything about a suit, an attachment, against Windsor Square having been filed while you were handling this subdivision, the suit being filed against Owens and Dinmore on March 8, 1930?

Mr. MACKAY: I object to the question on the ground it is (407) incompetent, irrelevant, and immaterial. Counsel is apparently seeking to establish some kind of title in the persons mentioned in his question by virtue of the fact that some creditor

(Testimony of L. J. Taylor.)

of theirs ran an attachment against them which, of course, is no way of proving any title whatsoever. Somebody might run an attachment against the Arizona Biltmore Hotel in a suit against me but it would be no evidence I was the owner of the hotel or had any interest in it.

The REFEREE: It may be answered.

The WITNESS: I remember that an attachment was attempted. I do not remember the date nor the names of the parties. I recollect some such circumstances arising involving a man named Williams (408).

Mr. NEALON: Well, there was an attachment levied upon the property, was there not?

Mr. MACKAY: I object, your Honor. That calls for a conclusion. And I object to the witness stating what the effect of that proceeding was or what the contents of the papers involved in it were, for the reason that the record in the court before whom the matter is pending is the best evidence, and until there is an excuse for its non-production this evidence is wholly improper. [819]

Mr. NEALON: I am not asking to prove the contents of any instrument.

Mr. MACKAY: If the Court please, he did ask, 'Is it not a fact an attachment was levied'. You know as well as I do you cannot tell that fact until you have looked at the sheriff's return. Mr. Taylor does not purport, so far at least, to have been present when the writ of attachment was issued or when it was recorded in the office of the recorder.

(Testimony of L. J. Taylor.)

Mr. NEALON: We are not seeking to prove any of those things.

Mr. MACKAY: We object to him testifying concerning the effect, as to what anybody did in respect to it.

The REFEREE: As to the proof of the attachment itself, the court record is the best evidence; no question about that.

Mr. MACKAY: We also object to the witness stating there was such a suit until it appears what the grounds of his information and belief is, what knowledge he has. Is it hearsay or what is it? (409).

Mr. NEALON: I think, if your Honor please, it is hardly necessary to use any argument to show that the objection is frivolous.

The REFEREE: Well, as to that part of it, of course, this witness would be able to state whether or not he knew, without the other qualifications.

Mr. NEALON: It is a question of showing knowledge of the record owner as to an attachment being levied on the property, as to his knowledge of it.

The REFEREE: That may be answered.

Mr. MACKAY: Note our exception."

The WITNESS: I say I do recollect some attempted attachment having been made (410). As far as I know Phoenix Title and [820] Trust Company never took any action in court in regard to any suits filed which might affect property in Windsor Square. My recollection is that an attachment was released very shortly after it was attempted to be levied (413).

FOREST WHITNEY

called as a witness on behalf of the Trustee in Bankruptcy testified as follows:

Direct Examination by Mr. Nealon.

I am credit manager for the publishers of two local newspapers known as The Republic and The Gazette. As credit manager for the Republican I had some dealings with Owens and Dinmore in regard to advertising concerning Windsor Square. I extended credit to them. Our claim is on file for the balance. Our bills were paid by Owens and Dinmore.

"Mr. NEALON: In dealing with them did you deal with them as the —— (415) as the owners of the property or not?

Mr. MACKAY: I object, your Honor——

The REFEREE: Let him finish the question.

Mr. NEALON: That is the end of the question, if your Honor please.

The REFEREE: All right.

Mr. MACKAY: —on the ground it is wholly immaterial what the Arizona Gazette or the Arizona Republic thought as to the ownership of Windsor Square. There are no allegations whatsoever in the Trustee's petition that any estoppel arises; that there is any waiver of a right under said declaration of trust. We are going (416) into matters which are wholly outside of the issues of the proceeding.

Mr. NEALON: I thing if your Honor please——

[821]

(Testimony of Forest Whitney.)

Mr. MACKAY: I further object to the question as calling for a conclusion of the witness. What does it mean? 'Did you believe they were the owners?'

The REFEREE: Well, it is pretty hard to rule——

Mr. MACKAY: It calls for a mental process. What is the basis of that mental process?

The REFEREE: It is pretty hard to rule upon some of these matters, the scope that has been covered——

Mr. MACKAY: The witness might have had a dream the night before he dealt with Mr. Owens, and he might have dreamed Mr. Owens was the owner of Windsor Square and decided that he was.

The REFEREE: He may answer, subject to the objection. Your objection appears.

Mr. MACKAY: An exception.

The WITNESS: We did.

Mr. MACKAY: I move to strike out the answer as calling (417) for a conclusion of the witness, and as an opinion.

The REFEREE: It may stand.

Mr. NEALON: Did you have any notice at the time you were dealing with Owens and Dinmore that Mrs. Margaret B. Barringer claimed any lien or mortgage upon the premises?

The WITNESS: No, sir.

Mr. MACKAY: I object to the question as being incompetent, irrelevant, and immaterial for any purpose whatever.

(Testimony of Forest Whitney.)

The REFEREE: It has already been answered.

Mr. MACKAY: Well, I assume I have an opportunity to make an objection at the conclusion of counsel's questions, and that it is not incumbent upon me to interrupt him in the middle of it.

The REFEREE: That is true, but you have a right to have the witness instructed not to answer until you have time to make [822] an objection. If the answer is made it is proper to move to strike the answer.

Mr. MACKAY: I move to strike out the answer of the witness on the ground that the question is calling for a conclusion of the witness.

The REFEREE: It may stand. The motion is denied.

Mr. MACKAY: An exception (418)."

Cross Examination by Mr. Mackay.

Mr. MACKAY: Now, Mr. Whitney, what inquiry did you make into the ownership of Windsor Square at the time that you concluded that Mr. Owens and his associates were the owners of that?

The WITNESS: Only through our past dealings with Owens and Dinmore with reference to the property, and the advertising and the property."

The WITNESS: I considered Mr. Owens and his associates to be subdividers of the property. My assumption was not based on any examination of the records of the office of the County Recorder. It was not based on any representation made by Mrs. Barringer nor any person purporting to act

(Testimony of Forest Whitney.)

for her. I did not even know of her existence (419). I made no check of the record title. I did not know that until January, 1928, record title stood in her name. We did not know there was a conveyance from her to Phoenix Title and Trust Company as Trustee conveying what is now Windsor Square.

Cross Examination by Mr. Gust.

Without referring to the advertisements themselves I could not say whether they contained the statement that title was held by Phoenix Title and Trust Company, as Trustee, and that deeds would be issued to it, and that moneys from sales must be paid to it. I have driven through the tract but do not recall a large sign on the tract which stated that titles were [823] furnished by Phoenix Title and Trust Company, as Trustee.

HENRY F. LEIBER

called as a witness on behalf of the Trustee in Bankruptcy testified as follows:

Direct Examination by Mr. Nealon.

I have resided in Maricopa County for twenty-three years. My business is that of painting outdoor advertising signs (421). My firm name is Myers-Leiber Company. We have filed a claim against the bankrupt named in these proceedings for sign work and advertising. The work was done at Windsor Square. In putting up the sign work and advertising I dealt with Owens-Dinmore.

(Testimony of Henry F. Leiber.)

"Mr. NEALON: Did you deal with them in the capacity of agents or as the owners?

The WITNESS: As far as I know, the owners.

Mr. MACKAY: We object to that, your Honor, on the ground it is calling for a conclusion of the witness, and wholly irrelevant, incompetent, and immaterial for any purpose whatever.

The REFEREE: The answer is in. It may stand.

Mr. MACKAY: An exception. I also move to strike out the answer of the witness for the same reasons, and ask the Court to please instruct the witnesses to give counsel sufficient time to interpose objections at the conclusion of examining counsel's question.

The REFEREE: Yes. Give time after each question to the opposing counsel for the purpose of objecting. The motion is denied.

Mr. MACKAY: An exception (422).

Mr. NEALON: Did you have any talk with Mr. Owens in regard to that property prior to the time that you extended credit thereon? [824]

Mr. MACKAY: I object to that on the ground it is wholly incompetent, irrelevant, and immaterial. Now, in clarifying that objection I would like to state to the Court that there has been no showing whatever that any of these alleged representations of ownersip on the part of Owens, Dinmore, and so forth, were ever concurred in by Mrs. Barringer or that she had any knowledge of them. The mere fact that a man goes around saying he is the owner

(Testimony of Henry F. Leiber.)

of property certainly will not preclude the real owner, or the real lienor, of his rights.

The REFEREE: Well, it may be answered subject to the objection.

The WITNESS: I had a conversation with Mr. Owens in regard to the property in Windsor Square before extending credit.

Mr. NEALON: What, if any, representations were made to you in regard to the ownership of the property? (423).

Mr. MACKAY: I object to that on the ground any such representations are wholly incompetent, irrelevant, and immaterial, if the Court please. If the Court please, I would like the record to show our objection to the introduction of any testimony tending to establish representations made by the beneficiary under the declaration of trust as to his ownership, for the reason that they are wholly incompetent, irrelevant, and immaterial; and for the further reason that there is no estoppel pleaded in the pleadings in this (424) proceeding before this Court.

The REFEREE: Well, the objection is in the record. You may proceed.

Mr. MACKAY: An exception."

The WITNESS: Mr. Owens told me that he owned it (425). At the time of making this representation he was in my office. To my knowledge improvement work was being carried on in Windsor Square at the time we extended credit to Owens

(Testimony of Henry F. Leiber.)

and Dinmore. Mr. [825] Owens was in charge of these improvements.

"Mr. NEALON: Did you have any information that Mrs. Barringer was claiming a lien or mortgage upon the premises at the time that you extended credit to Owens and Dinmore on Windsor Square?

Mr. MACKAY: I object to the question as being irrelevant, immaterial, and incompetent for any purpose.

The REFEREE: Overruled.

Mr. MACKAY: An exception.

The WITNESS: I did not (426)."

The WITNESS: We were paid by Mr. Owens and Mr. Dinmore for some of the work we did on Windsor Square. Payment was made in checks furnished by each of them.

Cross Examination by Mr. Gust.

I did not ask Mr. Owens whether the property was clear of liens. Mr. Owens told me that he had bought Windsor Square and was contemplating the purchase of ten additional acres on the corner. That was all he said about the nature of his ownership. He did not tell me that he had paid for the land in full.

"Mr. GUST: He told you he had paid something upon it?

The WITNESS: I think that the money was paid into the Phoenix Title and Trust Company. I went to the Phoenix Title & Trust Company (427) about—well, I think it was when that bulletin con-

(Testimony of Henry F. Leiber.)

tract was signed up, as to the money matter of it, and I think I talked to Mr.—a short, heavy-set fellow; I think he has charge of the title department or something with the Phoenix Title and Trust Company.

Mr. GUST: Who do you mean? Mr. Taylor?

The WITNESS: No, not Mr. Taylor. Mr. Taylor was here in the room today. I know him. I don't remember what the fellow's name was. I could tell you if I heard it. [826]

Mr. GUST: He told you they had a trust on it there?

The WITNESS: That they what?

Mr. NEALON: They had a trust on this property.

The WITNESS: No, he didn't tell me that. He told me I didn't have to worry; they would absolutely pay their bills, and they would see that the bills would be paid.

Mr. NEALON: That who would pay the bills?

The WITNESS: Owens-Dinmore. We done five hundred dollars' of work at one time. That is the time I went over there to find out about it."

The WITNESS: If I am not mistaken, his name was Barkley. He said we did not have to worry about it, that the money would be paid. He did not expressly say that Phoenix Title and Trust Company (428) would pay the bill but he left me under the impression that, if Owens-Dinmore did not pay it, Phoenix Title and Trust Company would do so. I know Mr. Barkley very well and do not think he would have mis-advised me. The signs

(Testimony of Henry F. Leiber.)

which I painted did not disclose the fact that Phoenix Title and Trust Company was Trustee for the property. I have a copy of some of them. It says, "Title is guaranteed by Phoenix Title and Trust Company." Owens-Dinmore had a general brokerage or real estate office. I painted for them many signs placed on other property which was for rent, for lease or for sale. They paid for it, too. Mr. Barkley was the only man I talked to at the office of Phoenix Title and Trust Company. I saw him because I knew him very well. I had no reason to see Mr. Nealon, whose name was not on the bulletin board.

"Mr. GUST: Was not your purpose in going there to find out what the nature of Mr. Owens' claim to that property was?

The WITNESS: No, the reason I went there was because it was a twelve hundred dollar order of signs and it was lots of signs. [827] Correct, yes, that is why I went there.

Mr. GUST: Yes. But wasn't it your purpose to find out what the nature of his ownership was?

The WITNESS: No, I wanted more specific to get an understanding or what the line-up was, yes.

Mr. GUST: That is what you went there for?

The WITNESS: Yes, sir.

Mr. GUST: And did you get it?

The WITNESS: I think I did (430)."

Cross Examination by Mr. Mackay.

"Mr. MACKAY: Would you state that you have a positive recollection Mr. Lieber, that you painted

(Testimony of Henry F. Leiber.)

signs for Mr. Owens and his associates which described them as the owners of Windsor Square?

The WITNESS: If I may make an explanation, I will say exactly what my recollection is.

Mr. MACKAY: Well, I ask you first, have you a clear recollection of it?

The WITNESS: I couldn't swear to it, nor, sir."

Redirect Examination by Mr. Nealon.

The four sheets handed me by counsel are copies of sign work. They were designed for Windsor Square,—Owens-Dinmore. These instruments were made out by Mr. Owens (435), who left them with us when he gave orders for the work. The work was done in accordance with these four sheets.

Thereupon, the instruments referred to were received in evidence (over the objection of Respondent Barringer as incompetent, irrelevant and immaterial) as

TRUSTEE'S EXHIBIT O.

Said exhibit is in words and figures as follows, to-wit: [828]

(Testimony of Henry F. Leiber.)

MYERS-LEIBER ADVERTISING SERVICE
WORKMAN'S COPY

(First Sheet)

ORDER No. 1370	NAME AND ADDRESS	DESCRIPTION
	Owens Dinmore—	4/1250
		312.50
DATE 1 - 15 - 1930		4/1750
	COPY	437.50

$312.50 Cash
$ 25.00 Monthly
Including Int.

$437.50 Cash
$ 35.00 Monthly
Including Interest

REMARKS

PRICE DEPOSIT

ORDER TAKEN BY AUTHORIZED BY

[829]

(Testimony of Henry F. Leiber.)

MYERS-LEIBER ADVERTISING SERVICE
WORKMAN'S COPY

(Second Sheet)

ORDER	NAME AND ADDRESS	DESCRIPTION
No. 1573	Owen Dinmore	
DATE		

COPY

REMARKS

MAPS

$45.00

PRICE DEPOSIT

ORDER TAKEN BY AUTHORIZED BY

[830]

(Testimony of Henry F. Leiber.)

MYERS-LEIBER ADVERTISING SERVICE
WORKMAN'S COPY

(Third Sheet)

ORDER	NAME AND ADDRESS	DESCRIPTION
No. 1400	Owens-Dinmore Co.	
DATE		
1-24-1930	—Central and Camelback—	Shrine Auditorium

COPY

WINDSOR SQUARE
SALESROOM
OWENS-DINMORE

REMARKS

ORDER TAKEN BY	AUTHORIZED BY	PRICE	DEPOSIT
		2.50	

[831]

(Fourth Page)

Febr. 26 - 1930
Brilliant Colors
red blue & black
on white

Scale 1/4" = 1 ft.

Night of Feb. 25th

AUCTION

PHOENIX TITLE & TRUST CO. Exclusive INSPECT THE PROPERTY NOW

GUARANTEES CLEAR TITLE WINDSOR SQUARE EVERY LOT IS PLAINLY MARKED

NO ASSESSMENTS
40.00 OWENS-DINMORE MAPS AND INFORMATION HERE

SALE TAKES PLACE IN TENT ON THE GROUNDS

Thursday - Friday - Saturday - March 7-8-9

2 Sessions each day at 1:00 and 7:30 P. M.

C. H. O'Connor & Son
Auctioneers

(Testimony of Henry F. Leiber.)

The WITNESS Resuming: These signs were of various sizes. When completed they were placed on Windsor Square by myself (436).

Re-cross Examination by Mr. Mackay.

The date appearing in the righthand corner under the order number represented the date on which the order was placed. I certainly assumed from my dealings with Mr. Owens that Owens-Dinmore Company were the owners of Windsor Square. I did not believe that Owens-Dinmore was a corporation from the fact that whenever we paint signs if the company is incorporated, it always states so. Owens-Dinmore didn't state "Owens-Dinmore, Incorporated." It stated, "Owens-Dinmore" only. We rendered our statements for the work that was done to Owens-Dinmore. We didn't send bills to Mr. Mills, and did not think he was one of the owners of Windsor Square. The Owens-Dinmore appearing on this exhibit was written by someone in the office that received the order originally. In rendering our statements, we charged this work to Owens-Dinmore, or Windsor Square. I think that Windsor Square was charged up, if I may make an explanation, as Owens-Dinmore, Windsor Square and the others were charged up as Owens-Dinmore—that is, any other stuff they had done.

W. H. NORMAN, JR.

called as a witness for the Trustee in Bankruptcy testified as follows:

I am one of the owners of the Norman Nursery which has filed a creditor's claim against the bankrupt for labor and plants furnished on the streets and around two houses built by Owens (443) and Dinmore in Windsor Square. We received instructions for our work from Mr. Owens who gave them to us in our office and also at the subdivision. At another time I went to the Coast, met Mr. Owens there, and we bought the stock for Windsor Square. Mr. Owens was on the tract at the time we were doing our work out there. He was over-seeing things and also was building a house, and was over-seeing that. Our work was done after the paving was finished. [833]

"Mr. NEALON: Did you have any knowledge or information in regard to there being a claim of lien by Mrs. Margaret B. Barringer (444) against the Windsor Square property when you put these trees——

Mr. MACKAY: We object upon the ground that it is irrelevant, immaterial, and incompetent for the witness to answer that question.

The REFEREE: As to whether or not he had knowledge he may answer.

Mr. MACKAY: Exception.

The WITNESS: No, sir, I had no knowledge of it until after this claim in bankruptcy was filed, and then Mr. Owens told me that it was on file."

(Testimony of W. H. Norman, Jr.)

The WITNESS: I had no previous dealings with Mr. Owens except with reference to landscaping the houses, for which work Mr. Owens paid us. The value of improvements placed by us on Windsor Square was about $1500 (445). Mr. Owens paid part of our bill. We have filed a claim for the balance.

Cross Examination by Mr. Mackay.

The only inquiry concerning outstanding liens which our firm made was rather indirect. While I was in the office of the engineer who drew the plans I inquired concerning Mr. Owens' credit. I was told that he was paying practically everything. It was apparent that he was putting in a lot of money there, but I really did not make any direct inquiry. That was the extent of my inquiry. That and talk that I heard. We furnished some of these plants on the grounds of two houses that Mr. Owens was building. Neither Father nor I made any examination of the records in the office of the county recorder to ascertain whether or not there were any liens against this property. We rendered [834] our statements to Mr. Owens in the form of Owens and Dinmore. The heading of the statement was Owens and Dinmore, but Dinmore was never around. The statements always went to Mr. Owens. We carried our accounts under the heading of Owens and Dinmore, and extended our credit to them. The improvements that we referred to were all in the nature of shrubs and trees, but the bill was mostly for labor for putting them in. Most of

(Testimony of W. H. Norman, Jr.)
the labor was put in on the trees around the streets and on the tract generally. The bill for putting trees and shrubs around the houses has been paid. The amount owing is entirely for those around the streets.

D. R. WHITNEY

called as a witness on behalf of the Trustee in Bankruptcy testified as follows:

I am Secretary and Treasurer of Schmidt-Hitchcock Contractors (448). I have been with that firm for three years. It has filed its claim in bankruptcy for materials ordered by Mr. Owens. He gave us the orders in our office. I have never been on Windsor Square.

"Mr. NEALON: At the time that you furnished the materials had you any information or knowledge as to a claim of Margaret B. Barringer of a lien or mortgage upon the Windsor Square property?

The WITNESS: No, sir.

Mr. MACKAY: Just a minute before you answer, I wish to object to that on the ground that it is incompetent, irrelevant, and immaterial.

The REFEREE: It may be answered.

The WITNESS: No, sir.

Mr. MACKAY: Exception (449)." [835]

The WITNESS: We were not paid for the materials which were furnished. The materials were for grading and levelling Colter Street.

(Testimony of D. R. Whitney.)

Cross Examination by Mr. Mackay.

We made no inquiry to ascertain whether there were any liens on the property known as Windsor Square.

Thereupon, there was received in evidence (over the objection of Respondent Barringer on the ground that the same is incompetent, irrelevant and immaterial) as

TRUSTEE'S EXHIBIT P

an order signed by the Referee in Bankruptcy under date of May 6, 1931, confirming the sale by the Trustee in Bankruptcy to W. D. Greer of the following described lots in Windsor Square (not involved in this controversy), at the respective prices set opposite the description thereof, as follows:

Lot 38	Block 3	$877.50
1	3	877.50
40	2	877.50
10	5	607.50
30	7	700.00
14	1	405.00
15	1	405.00
14	8	700.00
		$5,450.00

(Testimony of D. R. Whitney.)

Thereupon, there was received in evidence (over the objection of Respondent Barringer on the ground that the same is incompetent, irrelevant and immaterial) as

TRUSTEE'S EXHIBIT Q

an order signed by the Referee in Bankruptcy under date of June 18, 1931, confirming the sale by the Trustee in Bankruptcy to W. D. Greer of the following described lots in Windsor Square [836] (not involved in this controversy), at the respective prices set opposite the description thereof as follows:

Lot 21	Block 8	$875.00
9	9	360.00
20	5	585.00
		$1,820.00

GEORGE E. LILLEY

called as a witness for the Trustee in Bankruptcy testified as follows:

"Mr. NEALON: Mr. Lilley, I show you exhibit 'A' attached to the first account and report of Trustee, showing certain expenditures. Will you state just what those expenditures are and the purpose for which they were made?"

Which question was objected to by Respondent Barringer, the objection overruled and an exception saved.

(Testimony of George E. Lilley.)

The WITNESS: The item of $465 was advanced to the Central Arizona Light and Power Company for line extension, and a deposit of $150 as a guarantee on the power consumption account. The other expenditures shown on this report are $21 for labor on the tract. The power extension is money advanced under an agreement with the power company which has to be returned, an accounting being made annually by the power company, the amount returned being based upon the power consumption in the tract—that is, by houses or other connections onto the line so extended. It was for extensions of the power line as it existed at the time that I took the premises over in order to furnish power to consumers who were beyond the reach of that line. These consumers had been purchasers of lots in the Windsor Square Tract, or were tenants.

"Mr. NEALON: I show you, Mr. Lilley, a supplemental report to first account and report of trustee, dated April 22, 1931, and I call your attention to the items shown therein and ask you if [837] you made the expenditures named therein."

To which question Respondent Barringer objected, which objection was overruled, and an exception saved.

"Mr. NEALON: Will you read those into the record item by item, so that Mr. MacKay can object if he wants to?"

To which Mr. MacKay objected, which objection was overruled and an exception saved.

(Testimony of George E. Lilley.)

"Mr. NEALON: Limit your answer, Mr. Lilley, to the items for expenditures on the property."

The WITNESS: March the 11th, 1931, to William H. Schrader, $70 for salary as caretaker. April 6, 1931, the same party, $115.10. April the 6th, Henry Brown, $3.50 labor. April 6, Central Arizona Light and Power Company, power account, $95. April 6, the Arizona Welding Works, repair water pipe line, $48.75. April the 6th, Liefgreen Seed Company for supplies, $1.50. The last item I mentioned of payments to the Central Arizona Light and Power Company was for power account for pumping water to supply water to the residences in the tract, and for the watering of trees and shrubs in the parkways in Windsor Square. The three items of $100 each were fees paid to the appraisers appointed by this court.

"Mr. MACKAY: I move to strike the answer on the ground that it is wholly irrelevant, immaterial, and incompetent. I don't believe the expenses of administration have any bearing on whether or not Mrs. Barringer has a lien.

The REFEREE: I was just wondering about that, as to the expenses of administration.

Mr. NEALON: If your Honor please, the Bankruptcy Act prescribes the order in which the payments shall be male, and I take it that in preparing your order in this case you will take care of the various expenses of the administration in the order prescribed in [838] the Act. This is a part of the

(Testimony of George E. Lilley.)

necessary expenses covering the administration of the property itself."

Whereupon, the motion of Respondent Barringer to strike was denied, and an exception taken.

The WITNESS Resuming: E. E. Lane, to whom $100 was paid is president of the Lane-Smith Investment Company, a firm in the real estate business in Phoenix. L. R. Bailey is with the firm of Bailey and Upshaw, subdividers and real estate operators. Walter Martin is with the Greene and Griffen real estate company and the Homebuilders. I believe he is the principal stockholder in both these companies, as well as secretary and manager.

"Mr. NEALON: Mr. Lilley, I show you your second account and report as Trustee, dated June 18th, 1931. I will ask you in regard to an item shown in said report of $92.17, dated May 5, 1931, purported to be made to William Schraeder, salary as caretaker, if that amount was actually paid to Mr. Schraeder.

The WITNESS: Yes.

Mr. MACKAY: I object to that and all further questions which are asked for the purpose of showing that the Trustee has made any expenditures whatever for any purpose in connection with the care or custody of Windsor Square or the property described in the Trustee's petition; on the further ground that it is irrelevant, immaterial, and incompetent for any purpose, and has no bearing at all on the priority of Mrs. Barringer's lien.

The REFEREE: Objection overruled.

Mr. MACKAY: An exception."

(Testimony of George E. Lilley.)

The WITNESS Resuming: Mr. Schraeder was in my employ as Trustee in Bankruptcy of the Windsor Square property. Referring to the item dated May 5, 1931, of $69.70 to the Central Arizona Light and Power Company for operating pump, that expenditure [839] was actually made, and it was for operating the pump upon Windsor Square for the purpose of furnishing water to the people living in that square, and watering the tract itself. Referring to item dated May 5, 1931, for $4.50 for repair of pipe I will state that was for repairing the water system in Windsor Square. The item of June 5, 1931, for $71.41 was for power for operating the pump in connection with the water system in Windsor Square. The item of June 5, 1931, to the Arizona Welding Works for $3 was for repairing pipe, a part of the water system in Windsor Square. The item of June 5, 1931, for $95.71 to William Schraeder, was for salary as caretaker for labor done at Windsor Square. The item dated July 6, 1931, of $93.05 to the Central Arizona Light and Power Company, shown in the second report and account of Trustee, filed October 24, 1931, was for power used for pumping water in Windsor Square. The item of $94.71 to William Schraeder, July 6, 1931, was for money actually paid to Mr. Schraeder as caretaker for his work on Windsor Square. The item dated August 4th to Central Arizona Light and Power Company for power, $92.80, was money actually expended for pumping water in Windsor Square. The item of August 4th of $174.70 to Wil-

(Testimony of George E. Lilley.)

liam Schraeder was for labor in Windsor Square; that was labor and material—materials purchased by the caretaker. The material was a hundred feet of hose that was used for irrigating trees. $85 was for hose and $6.70 was miscellaneous expense. The item of September 10, 1931, for $101.89 to William H. Schraeder was for money actually expended in Windsor Square for salary and supplies. There have been no other expenses and disbursements as trustee since I filed that last report.

"Mr. MACKAY: I want to move to strike all of the testimony of the witness up to this point in the examination, on the grounds which were stated in various objections made to his testimony, [840] all of which relates to disbursements and expenditures by the Trustee; and for the further reason that under the declaration of trust which has been introduced as Respondent Barringer's exhibit number 2, it is expressly agreed by the Trustee in Bankruptcy's predecessor in interest that he will save Mrs. Barringer free and harmless from any charges for the upkeep, improvement, and maintenance of the property.

The REFEREE: Motion denied.

Mr. MACKAY: Exception."

The WITNESS Resuming: Referring to Trustee's Exhibit "A" in evidence, being a lithographed map, I am familiar with the property shown on that map and know the location of Colter Street with reference to the lines of the property in Windsor Square, as represented on the map. Colter Street

(Testimony of George E. Lilley.)

is the North boundary. Seventh Street is the east boundary of the tract. Camelback Road is the south boundary for about three-quarters of the way and Windsor Boulevard for about a quarter of the distance. Those are as shown on the map which I have shown you, which is Trustee's exhibit "A". The West boundary of the tract is Central Avenue. Central Avenue does not extend along the entire West boundary, but only the North half of it. The South half is bounded by an open tract which lies between Windsor Square and Central Avenue. It is a tract of approximately ten acres which does not belong to the subdivision. To the best of my knowledge, Windsor Boulevard, Windsor Drive, North Windsor Drive, Arden Street, Hermosa Drive, and Kenmore Drive are correctly represented on the map as to location.

"Mr. NEALON: Is this the map which you have used in your work in connection with appraisal and sales in this tract?"

This question was objected to by **Respondent Barringer**, which objection was overruled and an exception saved. [841]

The WITNESS: Yes, I have used this same copy for reference, or I should say, a copy of the same map, I guess. I produced this exhibit myself in the courtroom. It was furnished to me by Mr. Owens, with a number of other copies; all identical.

"Mr. NEALON: Now, have you been in possession of this property during all the time which you have been Trustee in Bankruptcy of this estate?"

(Testimony of George E. Lilley.)

Respondent Barringer objected to this question as calling for a conclusion, which objection was overruled, and an exception saved.

"The WITNESS: Yes.

Mr. NEALON: Has anyone questioned your possession during that period, Mr. Lilley?

The WITNESS: No, sir."

Cross Examination by Mr. MacKay.

As Trustee in Bankruptcy, I have other property in Windsor Square than the lots described in the petition filed in this hearing. Such property has been referred to as the bank lots. The disbursements which I described on my direct examination [842] were made for the benefit of both classes of lots. At the time I made these expenditures I knew that Respondent Barringer had filed a claim of lien in this court (466). I also knew that Phoenix Title and Trust Company was her Trustee. I knew that she claimed a lien securing Tunney's note under the Declaration of Trust (Respondent Barringer's Exhibit No. 2). I never read the Declaration of Trust. Prior to my appointment as Trustee in Bankruptcy (467) I was advised that Barringers owned the property comprising Windsor Square and had conveyed it to Phoenix Title and Trust Company under a trust arrangement. I was not informed by any one that the sale was outright or that Mrs. Barringer had been paid in full (468). I had also heard that Owens and his associates had not fully paid in cash the purchase price for the property. I have stated on direct examination that I have been in

(Testimony of George E. Lilley.)

possession of the property described in the bankrupt's schedule of assets. I have been operating the pump and water supply system. I have been caring for the trees in the parkways. There are no trees on the lots. I have attempted to keep the unsold lots free from weeds. I have killed a lot of rodents on the tract. I managed Windsor Square the same way I do any other subdivision that I have charge of. I am not living on it. I have not spent considerable time there and have visited a number of times (469) in directing the care of the property.

"Mr. MACKAY: Such possession as you have taken has been for purposes of repair and proper maintenance of the property?

The WITNESS: The possession that I have taken there was under an order of court to act as Trustee to administer the estate of the bankrupt.

Mr. MACKAY: Well, I am speaking of the actual, physical [843] possession that you have taken. Under that possession have you done anything further than to care for and repair the property and perhaps go over it for the purpose of ascertaining its value and perhaps effecting sales of certain portions thereof?

The WITNESS: Well, I don't know how to answer that question, because (470) when you sell real estate you don't go out and pick it up and hand it to somebody; you convey it by instrument in writing; and I haven't been out there and hoed any weeds or repaired any pipe lines personally, no.

Mr. MACKAY: Well, I understand that.

(Testimony of George E. Lilley.)

The WITNESS: I have been in possession of the property the same as I have been in possession of any other property that I have charge of or own.

Mr. MACKAY: Your general possession which you have lots which you have listed with your company for sale?

The WITNESS: No, it has been very different from lots which are listed for sale.

Mr. MACKAY: Well, now so far as we have ascertained that you have been in possession of the pump and that you have repaired pipe and you have generally seen that the property was supplied and that the necessary electricity therefor was obtained from the power company and that you removed some weeds and I suppose your man Schraeder perhaps has kept the streets clean and he has watered the trees. I want to find out what else you have done.

The WITNESS: Well, I would class that more as operating the property.

Mr. MACKAY: Well, I am not asking you as to your opinion as to what your acts constitute, Mr. Lilley I am asking you what in addition to those things you have done which might be in your mind a taking of possession. [844]

The WITNESS: I don't think I have done anything more.

Mr. MACKAY: You think that that pretty well covers the field so far? (471)

The WITNESS: I think so."

(Testimony of George E. Lilley.)

I knew the location of the lots, had a very good idea of their values and sold the bank lots by referring to the plat. I am not familiar with the provision contained in the Declaration of Trust (Respondent Barringer's Exhibit No. 2) to the effect that the beneficiary shall only have such possession as is necessary for effecting sales and performing his covenants thereunder (472). I do not know whether the Declaration of Trust requires the beneficiary to keep the property in repair. I did not consider that I was in possession under the Declaration of Trust. I was in possession under the order of this court.

"Mr. MACKAY: And you don't claim that you are in possession by virtue of any deed or instrument? (474)

The WITNESS: As I stated before I was in possession under an order of this court as Trustee.

Mr. MACKAY: Do you lay that claim to possession by virtue of any other instrument or contract or deed, or do you depend solely upon the order of the court for your possession?

The WITNESS: On the order of the court.

Mr. MACKAY: I assume that you have in your possession all of the emblements of title that the bankrupt had. Did the bankrupt turn over to you its books and accounts and deeds and contracts and evidence of its rights to title generally?

The WITNESS: No, there were no instruments turned over to me.

(Testimony of George E. Lilley.)

Mr. MACKAY: And if you can answer the question either 'yes' or 'no', I wish you would do so; do you lay claim to possession by [845] (476) virtue of the Declaration of Trust which has been introduced as Respondent Barringer's Exhibit No. 2? (477)

The WITNESS: No.

Mr. MACKAY: You don't claim any right of possession under and by virtue of the Declaration of Trust which has been introduced in evidence as Respondent Barringer's Exhibit 2? I just want to be certain of your answer, Mr. Lilley.

The WITNESS: No (479)."

Cross Examination by Mr. Gust.

I received from Phoenix Title and Trust Company, as Trustee, a deed conveying the lots described in Trustee's Exhibits P and Q. I do not remember whether I received said deed before or after confirmation (483).

"Mr. GUST: Now, do you recognize the claim of the Phoenix Savings Bank and Trust Company for the money received from the sale of those lots?"

To which question counsel for the Trustee in Bankruptcy objected, stating that Trustee's Exhibits P and Q were offered for the limited purpose of showing the value of lots in Windsor Square (484-485). The Referee sustained the objection.

Whereupon, counsel for the Trustee in Bankruptcy, on being interrogated by counsel for Respondent Barringer, refused to state whether or not

(Testimony of George E. Lilley.)

the Trustee in Bankruptcy contended the entire Declaration of Trust (Respondent Barringer's Exhibit No. 2) to be void and referred counsel to the pleadings (485).

"Mr. MACKAY: Well, if you are willing to tell me in open court, what is the source of title through which the bankrupt derives its interest in this case?

[846]

Mr. NEALON: The source is the adjudication in bankruptcy, by which by operation of law all the property of the bankrupt passed to the Trustee in Bankruptcy.

Mr. MACKAY: I understand that.

Mr. NEALON: Together with all the other rights that the Bankruptcy Act gives to the Trustee in Bankruptcy in addition to that title.

Mr. MACKAY: Well, then, it is fair to ask you, Mr. Nealon, what your contention is as to the acquisition of title by the bankrupt.

Mr. NEALON: I decline to answer that. I don't think the question is fair, if you want to put it directly, Mr. MacKay."

Whereupon, counsel for Respondent Barringer requested the Referee to require the Trustee in Bankruptcy to state the nature of the bankrupt's title.

"The REFEREE: Mr. Reporter, don't put all this in the record.

Mr. MACKAY: I insist on it being done.

The REFEREE: This?

Mr. MACKAY: Certainly.

(Testimony of George E. Lilley.)

The REFEREE: You may strike it all, strike everything in the way of argument of counsel here from the record. It has nothing to do with the issue.

Mr. MACKAY: Let the record show that we take exception to that order.

The REFEREE: Note the exception." (489)

The WITNESS Resuming: I do not recall making any agreement with Phoenix Savings Bank and Trust Company concerning proceeds arising from sale of bank lots (not involved in this proceeding). If I made any such agreement it was under order of court (491). I have made no such agreement, nor have I seen any such agreement [847] made by my attorney (494). I have received full payment from the sale of certain bank lots, from others I have merely received the initial payment (499).

"Mr. GUST: Well, then, Mr. Lilley, what I want to know is what kind of a deal you have with the Phoenix Savings Bank and Trust Company under which you are selling those lots." (501).

On objection by the Trustee in Bankruptcy, the Referee denied counsel the right to have the foregoing question answered, on the ground it involved matters outside the issues pleaded, to which ruling Respondent Phoenix Title and Trust Company saved exception (502).

Re-cross Examination by Mr. MacKay.

Under order of court I sold certain lots in Windsor Square other than those involved in this proceeding. I refer to the so-called bank lots. As

(Testimony of George E. Lilley.)
Trustee of Windsor Square Development, Inc. I delivered deeds to purchasers at such sales.

"Mr. MACKAY: And in consummating that sale did you procure any other grantor to execute and delivered to such purchasers any deeds or other evidence of transfer of title?

The WITNESS: I did not." (503)

Whereupon, counsel for Trustee in Bankruptcy objected to further cross examination along the foregoing lines. Counsel for Respondent Barringer avowed that he could prove by the witness that the Trustee in Bankruptcy in effecting sales of the so-called bank lots procured conveyances of the legal title to be made by Phoenix Title and Trust Company. The objection was sustained, the offer to prove was denied, and exceptions to both rulings were saved by Respondent Barringer (504).

Whereupon, counsel for Trustee in Bankruptcy offered [848] in evidence all the claims filed by creditors of Windsor Square Development, Inc., to which counsel for Respondent Barringer objected as incompetent, irrelevant and immaterial. The objection was overruled, an exception being saved by Respondent Barringer, and the instruments referred to were received in evidence as

TRUSTEE'S EXHIBIT R.

Said exhibit consists of all the unsecured claims filed against said bankrupt estate which are abstracted as follows:

Claims of Maricopa County for taxes on lots in Windsor Square for the years 1929 and 1930— $1,460.92

Nancy L. Moale for money loaned for Windsor Square to L. D. Owens, Jr. in September, 1929, on open account— 1,350.00

Myers-Leiber Painthouse for signs and painting furnished from November, 1929, to March 4, 1930— 247.00

Nick Diamos for rental under lease of ten acre tract at corner of Central Avenue and Camelback Road (near Windsor Square), given by claimant on January 4, 1930, to Windsor Square Development, Inc., being for installments of rental maturing as follows: 500.00

$100.00 on February 4th, 1930;
$100.00 on March 4th, 1930;
$100.00 on April 4th, 1930;
$100.00 on May 4th, 1930;
$100.00 on June 4th, 1930.

The Phoenix Gazette for advertising from October 5, 1929, to March 6, 1930— 491.60

Warner's Delivery Service for distributing circulars on March 5, 1929— 17.50

Hamman-MacFarland Lumber Company for lumber, lathe, shingles, cement and plaster, delivered January 15, 1930, to March 17, 1930— 136.65

Arizona Republic Engraving Company for advertising matter furnished between January 16 and February 25, 1930	$ 34.79
The Arizona Republic for advertising from January 15, 1930, to March 31, 1930	900.57
Schmidt and Hitchcock Contractors for labor and materials in levelling and grading Colter and Camelback Streets in 1930	125.00
Dwight B. Heard Investment Company for administrative service (date of maturity not given)	1,000.00
Gazette Job Printing Company for advertising matter from January 23, 1930, to March 7, 1930	213.15
George Bennett for money loaned to L. D. Owens for the purpose of improving the real estate listed in this bankruptcy proceeding as the property of the bankrupt, which debt said bankrupt assumed and agreed to pay; that said money was loaned in, to-wit, between the months of July and October, 1929	3,000.00

F. M. Hill for money loaned to L. D. Owens for the purpose of improving the real estate listed in this bankruptcy proceeding as the property of the bankrupt, which debt said bankrupt assumed and agreed to pay; that said money was loaned in, to-wit, the month of October, 1929	19,000.00
J. P. Atkin for money loaned to L. D. Owens for the purpose of improving the real estate listed in this bankruptcy proceeding as the property of the bankrupt, which debt said bankrupt assumed and agreed to pay; that said money was loaned in, to-wit, between the months of July and October, 1929	13,500.00
Norman Nursery & Flower Shop for landscaping from November 8, 1929, to January 31, 1930	390.57
Arizona Sand and Rock Company for sand and rock delivered from August 1, 1929, to January 21, 1930	249.70
Dorris-Heyman Furniture Company for trays, baskets, pail, eggbeater, paint brushes and rent for folding chairs furnished from January 22nd to February 25th, 1930	34.28

Kibbey-Bennett-Gust-Smith & Rosenfeld for legal services performed between Februrary 24th, 1930, and October 30th, 1930 ($250 thereof being for attempting to obtain extension of time for mortgagee) 295.00

[850]

Whereupon, the Trustee in Bankruptcy rested.

It was thereupon stipulated, at the request of Mr. Gust for the Phoenix Title and Trust Company, that Mr. Taylor would testify that since his testimony the other day the services performed by him in connection with these proceedings since that date on the same basis would amount to an additional sum of ten dollars.

Thereupon, it was stipulated by the Trustee in Bankruptcy that the claims of the State of Arizona and the County of Maricopa for lien for taxes might be fixed in the amount shown in the statements or filed in court, with the exception of penalties which were withdrawn by counsel, Mr. Clark, for the State of Arizona and County of Maricopa.

WITNESSES IN REBUTTAL ON BEHALF OF RESPONDENT BARRINGER.

L. J. TAYLOR

recalled in rebuttal on behalf of Respondent Barringer, testified as follows:

I have in my custody as Secretary of the Phoenix Title and Trust Company, a communication from Owens-Dinmore and Mills, in the month of January, 1929, advising our company to pay a commission to persons on sales of lots in Windsor Square.

Thereupon the witness produced the document, which was thereupon marked Respondent Barringer's Exhibit No. 13 for identification.

The WITNESS resuming: This instruction was handed to me by Mr. Owens after I had prepared it. I am quite satisfied it was signed in my presence by Owens and Dinmore. As to Mr. [851] and Mrs. Mills, it was not, but Mrs. Owens and Mrs. Dinmore were over here at various times, and they signed instruments in my presence. As to whether this is the true signature of all the persons who have subscribed it, I cannot say as to Mills. Mr. Owens told me it had been signed. Referring to Respondent Barringer's Exhibit 9 in evidence and bearing the signature of S. W. Mills appearing thereon, I would say that the signature of S. W. Mills appearing on Exhibit No. 13 for identification is written by the same person who signed his name to Respondent's Exhibit No. 9 in evidence.

(Testimony of L. J. Taylor.)

Thereupon, Respondent Barringer's Exhibit No. 13 for identification was received in evidence as [852]

RESPONDENT BARRINGER'S
EXHIBIT NO. 14.

Said exhibit is in words and figures as follows:

"TRUST INSTRUCTIONS

Trust No. 418

Phoenix, Arizona, January 11, 1929

Phoenix Title & Trust Company:

You are hereby authorized and instructed to pay to the Owens-Dinmore Company a commission of 23% of the selling price of any lot sold out of the subdivision into which the property covered by your Trust No. 418 may be subdivided.

You are further instructed to make checks for funds available to the Beneficiaries under your trust to L. D. *Ownes,* Jr. in the proportion of an undivided 5/6 interest, to H. C. Dinmore in the proportion of an undivided 1/8 interest and to S. W. Mills in the proportion of an undivided 1/24 interest.

You are further authorized and instructed to accept instructions from L. D. Owens, Jr. regarding the selling, platting and otherwise handling of the said trust property or any subdivision under which the said property may be subdivided, and to make

(Testimony of L. J. Taylor.)

disbursement for the improvements thereof or any other item or thing in connection with the handling of said property which is within the power and rights of the Beneficiaries under the said Trust, it being the intention hereof to give L. D. Owens, Jr. the necessary authority to properly and successfully handle said Trust and said subdivision for and on behalf of all of the Beneficiaries without, however, giving to L. D. Owens, Jr. any right in and to the profits which are or may become the property of H. C. Dinmore or S. W. Mills.

Phoenix Title and Trust Company and Phoenix Title and Trust Company, Trustee, is further authorized and instructed hereby to accept and act upon any assignment, document or other instrument which may be filed with it and which may require the signature of the Beneficiaries without such documents being joined in by Mary Margaret Owens, wife of L. D. Owens, Jr., Estelle Dinmore, wife of H. C. Dinmore or Dorothy Mills, wife of S. W. Mills.

(Signed) LEN D. OWENS, JR.
(Signed) MARY MARGARET OWENS
(Signed) H. C. DINMORE
(Signed) ESTELLE DINMORE
(Signed) S. W. MILLS
(Signed) DOROTHY R. MILLS"

(Testimony of L. J. Taylor.)

The WITNESS resuming: At a subsequent date the Phoenix Title and Trust Company received a communication from Mr. Owens on [853] behalf of himself and Dinmore and Mills and their respective wives in regard to the commission mentioned in Respondent Barringer's Exhibit No. 14.

Thereupon, the witness produced the instrument referred to and it was received in evidence as

RESPONDENT BARRINGER'S
EXHIBIT NO. 15.

Said exhibit is in words and figures as follows:

"Phoenix, Arizona, April 8, 1929

Phoenix Title and Trust Company:

WHEREAS, the Improvement Fund as set up under Trust No. 418 is not sufficient to pay for all of the proposed improvements, you are hereby authorized and instructed to hold all moneys payable to the order of the Beneficiaries arising from the property held under said Trust, and accrue the same in the Improvement Fund, as provided in Section Five of said Declaration of Trust; provided, however, that this instruction shall not interfere with the payment of commissions payable to the Owens-Dinmore Company of 23% of the selling price of lots in accordance with instructions given under date of January 11, 1929.

(Signed) LEN D. OWENS, JR."

(Testimony of L. J. Taylor.)

The WITNESS resuming: I have in my possession a communication from Owens-Dinmore Company, dated October 16, 1930, in which a waiver of such commission is made.

Thereupon the witness produced the statement referred to and it was received in evidence as

RESPONDENT BARRINGER'S EXHIBIT NO. 16.

Said exhibit is in words and figures as follows:

[854]

"TRUST INSTRUCTIONS.

Trust No. 418

Phoenix, Arizona, October 16, 1930

Phoenix Title & Trust Company:

There have been heretofore filed with your company instructions under which the Owens-Dinmore Company, a copartnership, has waived its right to receive commissions payable to it from the sale of lots in Windsor Square until the payment of other obligations.

You are hereby notified and instructed that the Owens-Dinmore Company does hereby waive all its right to receive any such commission from sales heretofore made in favor of the Beneficiary under your Trust No. 418 and that any instructions given you by the Beneficiary under your Trust No. 418

(Testimony of L. J. Taylor.)

reducing the amount of payments payable under any contract or otherwise changing the amount receivable from the sale of the lots in Windsor Square are hereby ratified, approved and confirmed.

The Owens-Dinmore Company further authorizes the Beneficiary under your Trust No. 418 to give any further instructions changing or modifying the terms of any contract or the payments to be received thereunder or in any other particular which may or does affect any commission rights of the Owens-Dinmore Company, without the necessity of obtaining any confirmation thereof from the Owens-Dinmore Company.

You are further instructed that all sums which may become payable to the Owens-Dinmore Company as commission for any sales heretofore made shall be credited in your trust to the account of the Beneficiary of such trust and shall thereupon be subject to all the costs, fees, charges, expenses and advances of the Phoenix Title and Trust Company properly payable by such Beneficiary and need not be kept in any separate account for the payment to Owens-Dinmore Company. All payments made to the Beneficiary under the provisions of this instruction or deductions made on account of costs, fees, charges, expenses and advances of Phoenix Title and Trust Company, which would otherwise have gone to the Owens-Dinmore Company, shall be treated as if the same had been paid to the Owens-Dinmore Company.

(Testimony of L. J. Taylor.)

This instruction shall likewise apply in all its particulars to any commissions which you have been heretofore instructed to deposit to the credit of or pay to the order of Windsor Square operating account which account was opened by Owens-Dinmore Company for a greater ease in segregating commissions due Owens-Dinmore Company and has no existence other and apart from the Owens-Dinmore Company and is subject to the sole control of the Owens-Dinmore Company.

Owens-Dinmore Company, a co-partnership consisting of Len D. Owens, Jr. and H. C. Dinmore, By (Signed) Len D. Owens, Jr.

The foregoing instruction is hereby ratified, approved and confirmed in all its particulars, Windsor Square Development, Inc. By (Signed) Len D. Owens, Jr." [855]

The WITNESS resuming: Since execution of the Declaration of Trust the Phoenix Title and Trust Company has executed numerous contracts for the sale of lots in Windsor Square. I have identified a stock form of such contract as the one regularly used and it has been introduced in evidence by someone. Before executing sales contracts, the Owens-Dinmore Company would sign an instruction to us that a certain lot had been sold, giving us the name of the customer and the amount of the sales price and the conditions as to taxes and water assessments under which the contract

(Testimony of L. J. Taylor.)
was to be made, and based upon that we would enter into the contract. In most of the cases we received the down payment from the Owens-Dinmore Company. I think in a few instances the buyers would come in and make their own down payment to us. Where the former was done, we executed the receipt in the name of the purchaser reciting it was paid by the Owens-Dinmore Company.

Thereupon, Respondent Barringer and Respondent Phoenix Title and Trust Company rested.

"Mr. NEALON: At this time, if your Honor please, we wish to make an offer in the record that the Respondent Barringer may amend her claim of lien to show an unsecured debt, and the same to be in compliance with the Bankruptcy Act and the general orders of the supreme court; that the Trustee will not oppose the allowance of such unsecured claim for such amount as the Court may find due thereon."

Thereupon, the Trustee in Bankruptcy rested.

Whereupon, counsel for Respondent Barringer moved to strike Trustee's Exhibit R (creditors' claims) on the [856] grounds stated in her objections to the offer of said exhibit and on the further grounds that the creditors' claims were hearsay and have not been allowed (518-519).

(Testimony of L. J. Taylor.)

"The REFEREE: The motion will be denied."

"Mr. MACKAY: All right, I would like to renew the motion on the further ground that it is improper to receive these exhibits as a whole. I believe that some of them upon their face do not purport to be claims of indebtedness against this bankrupt.

Mr. NEALON: That objection was not made at the time of their introduction. I offered to introduce them separately and counsel tacitly agreed that they might be introduced as one exhibit. No [857] objection was made upon that point.

Mr. MACKAY: I will submit the record upon that. I have no recollection of any stipulation. I believe I objected to their introduction in either manner.

The REFEREE: Of course, in the form in which they were introduced if such documents appear they would have no effect as proof if what you say is true. The motion will be denied."

"The REFEREE: It is stipulated that this matter shall be submitted upon briefs, the respondents herein to have 30 days in which to file opening briefs, but in case the transcript of the testimony is not filed within 15 days then such time to be extended so that the respondents will have 15 days from the date of such filing. The Trustee is to have 30 days thereafter in which to file his answering brief, and respondents to have ten days thereafter

(Testimony of L. J. Taylor.)

in which to file reply briefs, at which time the matter will be deemed submitted to the Court."

Mr. MACKAY: Let the record show that we do not by entering into this stipulation consent to our status being that of a respondent. We at all times insist we filed herein a petition in intervention and insist and rely upon the same.

Thereupon, at 11:30 o'clock a. m. December 18, 1931, the hearing in this matter was closed.

(Condensed statement in narrative form of the testimony of the witnesses contained in the said reporter's transcript and the said exhibits ends here). [858]

[Endorsed]: Part II. Lodged May 6, 1936, 4:49 p.m. Equity Rule 75, J. Lee Baker, Clerk, U. S. District Court, District of Arizona.

Statement of Evidence Filed Oct. 29, 1936. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona, by W. T. Choisser, Deputy Clerk.

Service of a copy of the within statement of evidence required by equity rule 75 is hereby acknowledged this 6th day of May, 1936.

THOMAS W. NEALON
ALICE M. BIRDSALL
Attorneys for George E. Lilley as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation.

[Title of Court and Cause.]

ORDER SETTLING, CERTIFYING AND ALLOWING STATEMENT OF EVIDENCE ON APPEALS.

The attached and foregoing statement of the evidence on the appeals under sections 24(a) and 24(b) of the Bankruptcy Act taken to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the United States District Court for the District of Arizona, Phoenix Division, made and entered in the above-entitled cause on January 7th, 1935, approving and affirming that certain "Order and Decree Fixing and Marshalling Liens, Determining Priority Thereof and Adjudging Certain Asserted Liens, and Interests Null and Void", dated September 17th, 1932, and signed by R. W. Smith, Esquire, one of the referees in bankruptcy of said district court, being presented in due time (as by orders duly enlarged) and found to be correct, it is hereby certified that said statement is a full, true and correct statement of the evidence upon said appeals, and each of them; that it contains all of the evidence and [860] proceedings certified by said referee to said district court on petitions to review said "Order and Decree Fixing and Marshalling Liens, Determining Priority Thereof and Adjudging Certain Asserted Liens, and Interests Null and Void" and, furthermore, that it contains all of the evidence and proceedings reviewed by said district court in said cause (no evidence

other than that certified by the referee having been reviewed by the district court in said cause); that all the recitals therein regarding the evidence and proceedings so certified and reviewed are true, full and correct, and that said statement is hereby approved, settled and allowed.

It is hereby further certified that the following exhibits were set forth verbatim at the request of George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., to-wit: Respondent Barringer's exhibits No'd. 1, 3, 14, 16; Trustee's exhibits No'd. C, D, G, H, and I; and that all other exhibits which appear verbatim do so at the request of Respondents Margaret B. Barringer and Phoenix Title and Trust Company; that all of the evidence is stated in condensed and narrative form except as to where the parties failed to agree as to what the narrative should be, and to that extent only the testimony verbatim has by order of this court been substituted for the narrative.

Dated October 29, 1936.

DAVE W. LING
United States District Judge.

[Endorsed]: Filed Oct. 29, 1936. [861]

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7765—B-570.

[Title of Cause.]

ORDER CONSOLIDATING RECORD ON APPEALS, AND EXTENDING TIME TO FILE RECORD, ETC., TO AND INCLUDING NOVEMBER 15, 1936.

Upon application of Mr. W. H. Mackay, counsel for appellants in the above-entitled cause, and good cause therefor appearing, IT IS ORDERED that a single consolidated record on appeal in above cause allowed by the judge of the District Court for the District of Arizona, under section 24(a) of the Bankruptcy Act, and the appeal allowed by order of this Court under section 24(b) of said Act, be and hereby is allowed to be filed as the record on both appeals.

IT IS FURTHER ORDERED that the time to file said record and to obtain the settlement, approval, authentication of the statement of evidence in this consolidated cause be, and hereby is extended to and including November 15, 1936.

CURTIS D. WILBUR
Senior United States Circuit Judge.

Dated: San Francisco, Calif., September 12, 1936. [Seal]

[Endorsed]: Order, etc. Filed Sept. 12, 1936. Paul P. O'Brien, Clerk.

A true copy.

Attest: Sept. 12, 1936. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Sep. 14, 1936. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona, by W. T. Choisser, Deputy Clerk. [862]

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7765—B-570.

[Title of Cause.]

ORDER EXTENDING TIME TO FILE RECORD, ETC. TO AND INCLUDING NOVEMBER 15, 1936.

Upon application of Messrs. Ellinwood & Ross, counsel for the appellants in the above entitled cause, and good cause therefor appearing, IT IS ORDERED that the time to file the certified transcript of record and docket the appeal allowed by the District Court of Arizona in above entitled cause be, and hereby is extended to and including November 15, 1936.

FRANCIS A. GARRECHT
United States Circuit Judge.

Dated: San Francisco, California, October 12, 1936.

[Endorsed]: Filed October 12, 1936. Paul P. O'Brien, Clerk.

[Endorsed]: Filed October 14, 1936. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona, by W. T. Choisser, Deputy Clerk. [863]

In the District Court of the United States in and for the District of Arizona.

No. 570 - Phoenix—In Bankruptcy.

[Title of Cause.]

PRAECIPE OF APPELLEE GEORGE E. LILLEY FOR ADDITIONAL PORTIONS OF RECORD.

To the Clerk of the United States District Court in and for the District of Arizona:

You are hereby requested to incorporate in the transcript of the record on appeal in the above entitled matter, in addition to those portions of the record set forth and designated in the praecipe of appellant served and filed herein, and in addition to those portions designated in the praecipe of this appellee which was filed herein on the 21st day of March, 1935, the following portions of the record which are desired by appellee, to-wit: [864]

(1) MOTION for order extending time of George E. Lilley, Trustee, to file objections and amendments to proposed statement of evidence, filed on May 18, 1936;

(2) ORDER of May 26, 1936, extending time within which trustee may file objections to statement of evidence lodged by respondent, filed May 26, 1936;

(3) OBJECTIONS and proposed amendments of George E. Lilley, Trustee, to statement of evidence lodged in the clerk's office, filed June 30, 1936;

(4) ORDER extending time for presentation, approval, settlement and filing of statement of evidence, signed by Judge F. C. Jacobs on July 6, 1936, and filed on July 20, 1936;

(5) MOTION of George E. Lilley to vacate order settling, certifying and allowing statement of evidence on appeals, filed November 4, 1936; and affidavits attached;

(6) ALL MINUTE ENTRIES in office of clerk of the District Court in this proceeding subsequent to filing of praecipe herein by this appellee, on March 21, 1935;

(7) THIS PRAECIPE.

THOMAS W. NEALON
ALICE M. BIRDSALL
Attorneys for Appellee George E. Lilley, Trustee in Bankruptcy. [865]

[Endorsed]: Received copy of the within this 4th day of November, 1936.

ELLINWOOD & ROSS
WM. H. MACKAY
Attorneys for
Margaret B. Barringer.

[Endorsed]: Filed Nov. 4, 1936. [866]

[Title of Court and Cause.]

MOTION FOR ORDER EXTENDING TIME OF GEORGE E. LILLEY, TRUSTEE, TO FILE OBJECTIONS AND AMENDMENTS TO PROPOSED STATEMENT OF EVIDENCE.

Comes now George E. Lilley, as trustee in bankruptcy of the estate of Windsor Square Development, Inc., a corporation, by Thomas W. Nealon, Esquire, and Miss Alice M. Birdsall, his attorneys, and moves this court for an order enlarging to and including the 1st day of July, 1936, the time of said George E. Lilley as trustee in bankruptcy aforesaid, to file his written objections and amendments to the proposed statement of evidence lodged in these proceedings by Margaret B. Barringer and Phoenix Title and Trust Company, a corporation, under Equity Rule 75, and served on said George E. Lilley, trustee as aforesaid, on the 6th day of May, 1936, hearing on the approval of which was noticed by said Margaret B. Barringer and Phoenix Title

and Trust Company, for the 18th day of May, 1936, which hearing and time for said George E. Lilley, trustee as aforesaid, to file objections and amendments, was duly extended by order of this court on the 18th day of May, 1936, to the 25th day of May, 1936, at ten o'clock A. M.

That this motion is based on the following matters: [867]

That said proposed statement of evidence so lodged as aforesaid herein, consists of two volumes comprising more than 364 legal size typewritten pages;

That it is apparent that such proposed statement of evidence is largely incorrect, and that it will be necessary for counsel for said George E. Lilley, trustee as aforesaid, to examine with particularity, every page of said proposed statement, and to set forth objections and proposed amendments to practically the whole thereof; that a great amount of work is involved in the preparation of necessary objections and amendments, and is such that it will require a period of at least thirty working days to properly prepare the same for presentation to the court with references to pages in the record and reporter's notes, so that the court may conveniently examine the same and judge the necessity therefor;

That said proposed statement of evidence involves the setting up of more than thirty-four documentary exhibits of great length, all of which must be minutely examined because material parts have been

omitted, and the legal effect of other parts improperly stated in said proposed statement of evidence;

That in the so-called narrative of the evidence contained in the proposed statement lodged, the testimony of the witnesses has been altered by substitution for the language used, the interpretation and conclusions of counsel for Margaret B. Barringer and Phoenix Title and Trust Company to such an extent that every page of same must be rechecked and numerous and voluminous changes made in order to properly present the issues in the case; [868]

That in addition to the above, there are 168 typewritten pages of other matter inserted in said proposed statement of evidence, the same being allegedly court proceedings in this cause, and which will require a minute examination in order to determine the correctness of same;

That the said Margaret B. Barringer, and the Phoenix Title and Trust Company, a corporation, have been engaged in the preparation of the record on appeal for a period of time of more than fifteen months, said appeal having been allowed by this court in the early part of February, 1935, and that it is manifestly unfair to the said George E. Lilley, trustee in bankruptcy aforesaid, to attempt to require his counsel to examine and correct such a voluminous proposed statement of evidence prepared in such a manner, within the short period of time allowed by said notice;

WHEREFORE, said George E. Lilley, trustee in bankruptcy as aforesaid, moves this court to make its order enlarging and extending the time of said George E. Lilley, trustee as aforesaid, to present his written objections and proposed amendments to said proposed statement of evidence to and including the 1st day of July, 1936.

Dated this 19th day of May, 1936.

THOMAS W. NEALON
ALICE M. BIRDSALL
Attorneys for George E. Lilley, Trustee in Bankruptcy of Windsor Square Development, Inc., a corporation.
Defendant.

[Endorsed]: Received copy of the within this 19th day of May, 1936.

ELLINWOOD & ROSS
Attorneys for
Margaret B. Barringer.
KIBBEY, BENNETT, GUST, SMITH & ROSENFELD
Attorneys for Respondent, Phoenix Title and Trust Company.

[Endorsed]: Filed May 19, 1936. J. Lee Baker, Clerk, United States District Court for the District of Arizona, by Jerome L. Buchman, Deputy Clerk. [869]

April 1936 Term At Phoenix

MINUTE ENTRY
of Monday, May 25, 1936.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

This cause comes on regularly this day for approval of Statement of Evidence, and for hearing on Trustee's Motion for Order extending time to and including July 1, 1936, within which to file Objections and Amendments to Proposed Statement of Evidence.

No appearance is made on behalf of Bankrupt.

Messrs. Ellinwood and Ross, by William H. MacKay, Esquire, appear as counsel for respondent, Margaret B. Barringer.

Messrs. Kibbey, Bennett, Gust, Smith & Rosenfeld, by F. O. Smith, Esquire, appear as counsel for Phoenix Title and Trust Company.

Alice M. Birdsall, Esquire, appears as counsel for George E. Lilley, Trustee.

Trustee's Motion for Order extending time to and including July 1, 1936, within which to file Objections and Amendments to Proposed Statement of Evidence, is duly argued by Alice M. Birdsall, Esquire, and William H. MacKay, Esquire, and

IT IS ORDERED that said Motion be granted.

Counsel for respondents may have to and including August 1, 1936, within which to settle and allow the Statement of Evidence.

If counsel for Respondents will prepare the Order Extending Time to Docket the Record in the Circuit Court of Appeals, it will be signed immediately.

If the Statement of Evidence has not been approved by August 1, 1936. An Order extending the time for approving the Statement of Evidence, will be entered at that time. [870]

April 1936 Term At Phoenix

MINUTE ENTRY
of Tuesday, May 26, 1936.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

ORDER EXTENDING TIME WITHIN WHICH TRUSTEE MAY FILE OBJECTIONS TO STATEMENT OF EVIDENCE LODGED BY RESPONDENTS.

The motion of the Trustee in Bankruptcy in the above-entitled cause for extension until July 1, 1936, of the time *within trustee* may file objections to the statement of evidence heretofore lodged with the clerk, came on regularly for hearing, Thomas W. Nealon, Esq. and Miss Alice M. Birdsall, appearing for trustee, Wm. H. MacKay, Esq., appearing for respondents Phoenix Title and Trust Company and Margaret B. Barringer; thereupon said re-

spondents, by their counsel, objected to allowance of trustee's motion unless the same be granted upon the following conditions, to-wit:

(1) If said settlement and approval be not completed by August 1, 1936, said respondents shall be entitled to receive further extension of the time within which to obtain such settlement and approval and within which to file the record and docket their case on appeal.

(2) If the Honorable Fred C. Jacobs, United States District Judge be not available within the District of Arizona on said 1st day of July, 1936, said objections shall be heard and the statement of evidence shall be settled and approved by any other judge then sitting in the said District of Arizona. [871]

After argument by respective counsel it was ordered that the time within which the trustee may file objections to the statement of evidence heretofore lodged by said respondents herein shall be, and the same is hereby, extended to and including the 1st day of July, 1936, on condition that, if said statement be not settled, approved and filed with the clerk in ample time to permit said respondents to file the record and docket their case on appeal, an order shall be timely entered further and amply extending the time within which said statement of evidence may be settled, approved and filed with said clerk and amply extending the time within which said respondents may file the record and

docket their case on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 25th day of May, 1936.

F. C. JACOBS

United States District Judge. [872]

[Title of Court and Cause.]

OBJECTIONS AND AMENDMENTS OF GEORGE E. LILLEY AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF WINDSOR SQUARE DEVELOPMENT, INC., A CORPORATION, BANKRUPT TO PROPOSED STATEMENT OF EVIDENCE OF MARGARET B. BARRINGER AND PHOENIX TITLE AND TRUST COMPANY, LODGED IN THIS COURT ON MAY 6, 1936.

Comes now George E. Lilley, as trustee in bankruptcy of the estate of Windsor Square Development, Inc., a corporation, bankrupt, by his undersigned attorneys, and objects to the proposed statement of evidence of Margaret B. Barringer and Phoenix Title and Trust Company, lodged herein on the 6th day of May, 1936, and presents the following objections to said [873] statement of evidence as lodged herein, and the following proposed amendments thereto, and asks this court that these objections thereto may be sustained and that said

proposed statement of evidence be not settled and allowed in the form as presented and lodged herein by said Margaret B. Barringer and Phoenix Title and Trust Company.

Said objections and proposed amendments are as follows:

OBJECTIONS:

FIRST: Said George E. Lilley, as Trustee in Bankruptcy of the estate of Windsor Square Development, Inc., a corporation, bankrupt, objects to the settlement or approval of the proposed statement of evidence as lodged herein by Margaret B. Barringer and Phoenix Title and Trust Company, for the reason that it is apparent therefrom, and especially from the first page thereof, that it is not a true or complete statement of evidence and is not properly appeared in conformity to the requirements of Equity Rule 75, subdivision (b).

SECOND: Said George E. Lilley, as Trustee in Bankruptcy of the estate of Windsor Square Development, Inc., a corporation, bankrupt, objects to said proposed statement of evidence in the form as lodged herein by Margaret B. Barringer and Phoenix Title and Trust Company, and to the whole thereof, upon the ground that said proposed statement of evidence is improperly prepared and the matter included therein does not comprise a true or complete or proper statement of evidence as required under the provisions of Equity Rule 75, subdivision (b), and said Trustee asks that the same be stricken from the files.

Without waiving said objections hereinabove set forth, [874] but expressly insisting upon same, said George E. Lilley, as Trustee in Bankruptcy of the estate of Windsor Square Development, Inc., a corporation, bankrupt, submits the following proposed amendments to the so-called "Condensed statement in narrative form of the testimony of the witnesses contained in the said two volumes of the reporter's transcript and the exhibits certified by the referee to the District Court", comprising Pages 189, et seq. of said Proposed Statement of Evidence:

PROPOSED AMENDMENT NO. 1.

Strike out matter commencing with Line 15, page 198 thereof, and continuing to the 12th line from the bottom of page 200 thereof, and substitute in lieu thereof the following:

Thereupon, counsel for Respondent Barringer asked permission to amend pleading filed by said respondent in answer to trustee's petition to marshal liens filed herein on June 6, 1931, by adding a paragraph (six) as follows:

> "This defendant denies that said trustee now is, or ever was, in possession of the premises described in the petition filed herein by the trustee to marshal liens on June 6, 1931."

and also asked that the record show objection by Respondent Margaret B. Barringer to any proceedings had before the Referee, in which the validity of her lien is by the trustee contested, and moves

to strike from the trustee's petition to marshal liens filed on June 6, 1931, the eleventh and twelfth paragraphs thereof. Objection having been made by counsel for the trustee in bankruptcy upon the ground that the motion to strike was too late after answer had been filed, the motions of Respondent Barringer to amend and to strike were by the Referee denied, to which rulings Respondent Barringer saved exceptions. [875]

"Mr. NEALON: If your Honor please, I would like in this case, and I think Mr. Mackay agrees with me, and I suppose Mr. Gust would, too, that the usual rule that all the rulings be preserved to the answers and when we come to the testimony that it be taken down subject to the objection, so that on appeal the whole record will be before the court, following the usual practice in that matter.

The REFEREE: Yes.

Mr. NEALON: That may be done, I assume?

The REFEREE: That may be done."

Thereupon, the "Motion to Strike out Redundant and Impertinent Matter from the Answer of Margaret B. Barringer", theretofore filed by the trustee in bankruptcy, was argued by counsel and granted by the Referee, an exception to said ruling being saved by Respondent Barringer.

Thereupon, "Motion to Strike out Redundant and Impertinent Matter from Amended Answer of Phoenix Title & Trust Company to Order to Show Cause on Trustee's petition to Marshal Liens and

Sell", theretofore filed by the trustee in bankruptcy, was argued by counsel and granted by the Referee, it being stipulated that counsel for Phoenix Title & Trust Company might, within ten days thereafter, if deemed necessary, file an amended pleading on matters affected by ruling on said motion, but that the hearing should proceed at this time. It was further stipulated between counsel that if matters raised in the motion for bill of particulars theretofore filed by the trustee in bankruptcy, as against Phoenix Title & Trust Company were not adduced by the evidence at the hearing, that said Phoenix Title & Trust Company would supply the same.

Thereupon it was stipulated that the Respondent [876] Barringer might also have the privilege granted to Respondent Phoenix Title & Trust Company, to amend her pleadings as to any matters affected by the ruling of the court in granting the motion to strike from the Answer of Margaret B. Barringer.

L. J. TAYLOR,

a witness called on behalf of Respondent Barringer, testified as follows:

Direct Examination by Mr. MacKay.

I am, and in 1928, was secretary and trust officer of Phoenix Title & Trust Company. I had a business transaction in which Mrs. Barringer and Mr. Owens were involved. I first met Mrs. Barringer some time

(Testimony of L. J. Taylor.)

after that, as Mr. E. J. Bennitt acted as Mrs. Barringer's agent in that business, and my negotiations were with him. I was acquainted with L. D. Owens, Jr. at that time, and with H. C. Dinmore, but I never met Mr. S. W. Mills. I have in my possession deed or instrument of conveyance whereby Mrs. Barringer conveyed real estate to Phoenix Title & Trust Company. Whereupon, witness produced the instrument which was marked Respondent Barringer's exhibit No. 1 for identification. The date of said instrument is December 17, 1928. It was stipulated by counsel that the property described in said exhibit was later subdivided under the name of Windsor Square.

Whereupon, said document was received in evidence as Respondent Barringer's exhibit No. 1. Respondent Barringer's exhibit No. 1 is in words and figures, as follows, to-wit:

PROPOSED AMENDMENT NO. 2.

Strike out the first fifteen lines on page 203 thereof, and substitute in lieu thereof, the following: [877]

The Phoenix Title & Trust Company as such gave no money or other thing of value in return for the conveyance. At that time I knew Thomas J. Tunney. He was a clerk in the Phoenix Title & Trust Company and, so far as I know, did not owe Mrs. Barringer any money. I have in my possession a declaration of trust which was executed by

(Testimony of L. J. Taylor.)

the Phoenix Title and Trust Company covering the premises described in Respondent Barringer's exhibit No. 1. The declaration of trust is dated January 9, 1929, and is signed by Mr. Clements as vice-president of the Phoenix Title & Trust Company and attested by myself as secretary. I know the signatures of Mr. Clements and myself to be true signatures.

PROPOSED AMENDMENT NO. 3.

Strike out commencing with the 8th line from the top of page 227 thereof, and continuing through line 20 of said page, and substitute in lieu thereof, the following:

I am familiar with the handwriting of Thomas J. Tunney. Examining the instrument you hand me, which is a note dated December 20th, in the sum of $85,000, payable to Margaret B. Barringer, purporting to be signed by Thomas J. Tunney, the signature thereon is Mr. Tunney's signature.

Thereupon said note was introduced in evidence as Respondent Barringer's exhibit No. 3, which exhibit is in words and figures as follows, to-wit:

$85,000 Phoenix, Arizona, December, 20, 1928

"Three years after date, for value received, I promise to pay to MARGARET B. BARRINGER or order, at 130 West Adams Street, Phoenix, Arizona, the sum of EIGHTY-FIVE THOUSAND and no/100 Dollars, with interest thereon from December 20, 1928 to maturity of

(Testimony of L. J. Taylor.)

this note, at the rate of seven per cent per annum, payable quarterly. [878]

"Should the interest as above not be paid when due, it shall thereafter bear interest at ten per cent per annum until paid.

"Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note, with interest from date of such default at ten per cent per annum until paid on the entire unpaid principal and accrued interest.

"Should the principal hereof not be paid in full at maturity, it shall thereafter bear interest at ten per cent per annum until paid.

"Principal and interest payable in lawful money of the United States of America.

"Should suit be brought to recover on this note, I promise to pay as attorney's fees 5% additional on the amount found due hereunder.

This note is secured by Declaration of Trust No. 418 of the Phoenix Title and Trust Company."

(Signed) THOMAS J. TUNNEY."

The reverse side of said exhibit bears the following endrosement: "Interest credited hereon to Jan. 10, 1929, date of closing transaction as per agree-

(Testimony of L. J. Taylor.)
ment between parties. By Phoenix Title & Trust Company (Signed) L. J. Taylor, Trust Officer."

PROPOSED AMENDMENT NO. 4.

Strike out the words, "trust property" in 2d line from bottom of Page 235 thereof, and insert in lieu thereof, the following: "Property described in the declaration of trust."

PROPOSED AMENDMENT NO. 5.

Strike out commencing with the 7th line from top of page 236 thereof, and continuing through to 4th line from bottom of page 237 thereof, and substitute in lieu thereof, the following:

Cross-examination by Mr. Nealon.

I handled this transaction, except as to minor details, practically since its inception. There was a consideration [879] paid in the transaction, but not by the Phoenix Title & Trust Company. At the time of the passing of the deed, $20,000 cash was paid into our hands by L. D. Owens, Jr. So far as I know, nothing had been paid previous to that time. At the same time the $20,000 was paid, Mr. Owens paid other money into our hands. He paid us all told $50,000. Another ten thousand was subsequently paid by other parties, $7,500 being paid by H. C. Dinmore and $2,500 by S. W. Mills. Mr. Owens made his payment on January 11, 1929. That was the payment of $50.00, and was paid by cashier's

(Testimony of L. J. Taylor.)

check delivered to me by Mr. Owens. The ten thousand was paid on January 14, 1929. Mr. Tunney is a clerk in the Phoenix Title & Trust Company, having been there for several years. He put up no part of the consideration, but he received compensation of $20 for signing the note. The note was signed by him about the time this whole thing was done. I cannot tell the exact date because the note is dated one date in December and the transaction was closed at a later date in January. Tunney executed the note between that time and the actual signing of the declaration of trust. I am sure the note was not signed on the actual date it bears because I put an endorsement on the note of interest being credited so it would not be charged up prior to the delivery of the note. The probabilities are that the declaration of trust was not signed on the date it bears, which is January 9th. The reason for this is that the instrument by which we acquired title was not recorded until January 14th. The complete terms of the deal were settled as of January 9th. The money was paid to us on the 11th and 14th, respectively, and we recorded the deed on the 14th. I feel sure I did not sign the instrument until we had title, and I am satisfied that the instrument was signed by the Phoenix Title & Trust Company on January 14th, when the [880] deed was recorded. It was signed by other parties prior to that time. The instrument was complete at the time we signed it. It was executed in triplicate, one copy being de-

(Testimony of L. J. Taylor.)

livered to Mrs. Barringer, one to L. D. Owens, and the other is the copy in evidence here. The purpose of having Mr. Tunney sign the note, as stated to me by Mr. Owens, was that Owens did not want the personal liability. Our check for the taxes was drawn on November 3, 1930, and payment was made direct to the treasurer by us. The receipts that I spoke of having been received since bankruptcy were payments upon lots previously sold. We have had no other source of income except what Mrs. Barringer put into our hands for this purpose.

Redirect Examination by Mr. MacKay.

The total consideration for this transaction was $105,000, of which $20,000 was paid in cash and $85,000 by the Tunney note. We paid all told to Mrs. Barringer or to Mr. Bennitt as her agent, $20,000 cash in connection with the sale. These other payments made into our hands were for purposes covered in the declaration of trust. Since the filing of the petition in bankruptcy our company, as trustee under this declaration of trust, has executed conveyances covering lots in Windsor Square. There has been no change in our procedure concerning the title on things paid out since bankruptcy started. I am not prepared to say whether anybody has paid out and gotten deeds or not. I haven't looked it up to see.

Mr. MACKAY: Has your company, Mr. Taylor, conveyed any lots the release prices of which have

(Testimony of L. J. Taylor.)

been paid, or in part paid, since the beginning of these proceedings, I will ask you first, do you know whether it has?

The WITNESS: Yes, there have been some conveyances. [881]

Re-cross Examination by Mr. Nealon.

Mr. NEALON: Were they all lots that are involved in this hearing, Mr. Taylor?

The WITNESS: You will have to make that a little more definite, Mr. Nealon.

Mr. NEALON: Were they all lots that had been released from any claim of Margaret B. Barringer prior to the pendency of the bankruptcy proceedings?

The WITNESS: Some of them were. I am not positive whether there were any lots that hadn't been released by Mrs. Barringer before the bankruptcy started that have been conveyed. I cannot answer that question as to whether any of them included the lots upon which Mrs. Barringer had a lien at the time of the bankruptcy. I know that some were conveyed which had been released prior to that time.

Mr. NEALON: Do you know whether any of those deeds were executed on the contracts that had been made prior to bankruptcy?

The WITNESS: No, I don't know.

Mr. NEALON: Will you furnish the Court with a list of the deeds executed by you since the adjudi-

(Testimony of L. J. Taylor.)

cation of bankruptcy or since the filing of the petition in bankruptcy, which was October 25th last?

The WITNESS: I can have such a list prepared. I cannot give it to you.

Mr. NEALON: So far as I am concerned, I am willing to stipulate that such a list may be received in evidence upon Mr. Taylor's certificate.

Mr. MACKAY: We will so stipulate. I suppose it would be well to see whether the release price in some instances was paid after the date of bankruptcy. Could you show that also, Mr. Taylor?

[882]

The WITNESS: Yes, sir.

PROPOSED AMENDMENT NO. 6.

Strike out commencing with 4th line from bottom of page 238 thereof, and continuing to 9th line from top of page 240 thereof, and substitute in lieu thereof, the following:

I am treasurer of Phoenix Title & Trust Company. Its books and records are kept under my supervision. I became treasurer in January, 1929. In January, 1929, I was notified by the directors or officers of the company that it had executed this declaration of trust, and a copy was placed in my custody. We set up a main trust ledger concerning the trust and also individual contracts concerning each lot that was sold. From time to time we received payments from lot purchasers. Our depart-

(Testimony of L. J. Taylor.)

ment made allocation and disbursement of such moneys. The payments were split up in accordance with the declaration of trust. The records I have contain a complete statement of all payments made to our company by lot purchasers and also contain accurate statements of how the money has been disbursed or allocated by our department. I have recently examined the records and from such examination can state that the amount of money which has been collected from contracts in Windsor Square and applied to the Barringer indebtedness consisting of the $85,000 note signed by Tunney, is $15,125.30, leaving a balance of $69,974.70. According to our records, the interest on the Tunney note has been paid to December 20, 1929, the interest coming from beneficiary funds. No moneys have been received by our company since that date. Since October 25, 1930, some payments have been coming in from contract purchasers. The amount of such accruals to date is $2,015.44. This is not [883] the total amount received because certain expenses and fees of the trustee have been deducted. After paying these fees and expenses of the trustee, we had on hand on November 14th, $2,320.24. Of the money collected, we allocated $165.33 to the improvement fund, and we have $2,015.44 to apply upon this note. We have not made such application on account of these proceedings. We were ordered by the trust department not to disburse any funds from that

(Testimony of L. J. Taylor.)

trust. The order was made shortly after the bankruptcy proceedings were started.

Cross-Examination by Mr. Nealon

The application of $15,125.60 upon the Tunney note leaving a balance of $69,974.70, was all done prior to the bankruptcy proceedings on October 25, 1930, and since that time, the trust has been held in status quo. I cannot at this time separate the figures showing what collections were upon the lots involved in these proceedings. The $165.33 which I said went into an improvement fund has not been applied as yet. We are holding that. The total amount we were holding on November 14, 1931, was $2,320.24. Since that time, there have been three collections which total $125. We have no charges made against this estate prior to October 25, 1930, which have not been paid. The amount that was applied as payment on principal on the Tunney note, should be $15,025.30, instead of $15,-125.30 as I testified. That was an error in subtraction.

PROPOSED AMENDMENT No. 7

Strike out commencing with 10th line from bottom of page 244 thereof, and continuing through to 4th line from bottom of page 245, and substitute in lieu thereof, the following: [884]

Q. What is the market value of the unimproved lands in that immediate section, Mr. *Kay*?

A. Well, I would be glad to take $750 an acre for mine now.

(Testimony of L. J. Taylor.)

Mr. NEALON: I move to strike out the answer as not being responsive to the question.

The REFEREE: Just answer the question as indicated.

The WITNESS: Well, it would depend whether it is upon that paved road. It would be more than if it is back a little bit. In my opinion, the value of the eighty acres just north of this property—just across Colter Street, is around six or seven hundred dollars an acre. Windsor Square I place at a higher valuation, at $1,000 to $1,200 an acre, because it is on the main highway and paved. I consider the valuation of the paving and the cost of the improvements in that. I do not know the cost per lot of the paving there. Referring to the map of the subdivision, I would value Lot 3 in Block 1 at $400. Lots 4 and 5 in the same block would be the same value. Lot 10 in the same block I think $300 would be a good price for that, and Lot 11 about the same. Lot 18 in Block 1 I would say about $350. I am taking into consideration that it is paved in front of that lot. I am familiar with the cost of paving generally in the city. This lot being practically 60 feet, the cost of the paving equal to that in front of that lot, would be between $250 and $300. If they paid cash for the paving, there would be a considerable discount. Lot 19 would be about the same value. In block 2, I would value Lot 18 at around $350. Without the paving, I would probably value it at $200. The paving adds a great deal

(Testimony of L. J. Taylor.)

to it. A great many people would rather buy a lot without the paving. I wouldn't say that when the paving is paid for, but the lot is bound to be cheaper. I do not know that the paving here is all paid for. Lot 14 in Block 1 I would value at around $400. Lot 40 in Block 2 I would value right [885] around $550. Lot 1 in Block 3 I would value at $600. Lot 38 in Block 3 about $650. Lot 10 in Block 5 about $550. Lot 14 in Block 8 $450. Lot 21 in Block 8, $650 or a little more. Lot 1 in Block 9 is worth $1200. Lot 26 in Block 4 about $1800. I do not know of any sales of property improved similarly to Windsor Square that have been made within the last year—not vacant lots. I am basing my opinion on my own judgment. My own judgment is based on a little common horse sense. It is my own personal opinion; that is the only ground I have. I based my opinion of the value of ten to twelve hundred dollars per acre which I placed upon the whole tract solely upon my own opinion and I have no further grounds for that opinion than I have given here.

PROPOSED AMENDMENT No. 8.

Strike out commencing with the 12th line on the top of page 246 thereof, and continuing to the 3rd line from top of page 248 thereof, and substitute in lieu thereof, the following:

Q. You are the trustee for the bankrupt in this case, are you not, Mr. Lilley?

A. Yes, sir.

(Testimony of L. J. Taylor.)

Q. And you have had a fairly long and varied experience as a realtor in this city, have you not?

A. Yes.

Q. At the present time you are president of the Dwight B. Heard Investment Company, are you not?

A. Yes.

Q. And you are familiar with values of real estate in Phoenix and vicinity?

A. Yes, I think so.

Q. And you have consummated yourself and supervised the consummation by other men in your company of numerous real estate sales and trades, and you have observed sales and exchanges that have been made by other firms in this city for [886] many years?

A. Yes.

Q. And as such you have acquired sufficient knowledge of the conditions and circumstances surrounding the real estate values in the city of Phoenix and vicinity to form an opinion as to the value of most any real estate, have you not?

A. Yes, I can always form an opinion of anything I examine.

Q. And you have sufficient knowledge and information upon which to form an opinion as to the cash sale value of property which is not released from the declaration of trust in the Windsor Square Development, Incorporated? I am not asking you

(Testimony of L. J. Taylor.)

for your opinion yet but I am asking you if you have one.

A. Yes, I can form an opinion upon that all right.

Q. Now, let us assume, Mr. Lilley, if we were to hold a sale of all the property in Windsor Square which has not been released from the declaration of trust, could you form an opinion as to what would be the highest cash offer which would be made for a sale of that property en masse, not by separate lots but in its entirety?

Mr. NEALON: I object to that, if your Honor please, adding to our other objections, that it is no way to fix values. You cannot tell in that way that the best cash bid would be made.

The REFEREE: Well, what cash would be paid would hardly fix value. The objection is sustained.

Mr. MACKAY: An exception.

You may answer, Mr. Lilley.

A. I don't believe I want to make a guess on what cash offer could be obtained at this time. It would be a random guess. I don't think it would be worth anything at all.

By Mr. MACKAY:

Q. Have you an opinion as to the present cash value of that property in its entirety?

A. Yes, I would have to do a little [887] figuring to arrive at what my opinion would be, but it would be based on sales that have been made there recently in the tract.

(Testimony of L. J. Taylor.)

Q. It would be based upon what you consider the cash value of each separate lot and then making an aggregate of such values, would it?

A. Yes, with some deduction, of course, for making a wholesale trade.

Q. It would be impossible, would it not, to sell those lots separately for a sum we will say as high as sixty or seventy thousand dollars, by selling the entire tract to one purchaser?

Mr. NEALON: I object to that. In the first place it is a leading question. In the second place it is not clear.

By Mr. MACKAY:

Q. I am asking you, of course, for your opinion.

A. Yes, I don't believe I quite got that.

Mr. MACKAY: Will you read him the original question, please, Mr. Reporter?

(Thereupon the original question was read aloud by the reporter, as follows:)

"Question: It would be impossible, would it not, to sell those lots separately for a sum we will say as high as sixty or seventy thousand dollars, by selling the entire tract to one purchaser?"

The WITNESS: I don't see how you can sell that separately——

Mr. MACKAY: I will strike the question. It is ambiguous.

By Mr. MACKAY:

Q. In your opinion, Mr. Lilley, at the present time could a sale of the entire tract be made to

(Testimony of L. J. Taylor.)

any person or corporation for a sum as high as sixty or seventy thousand dollars?

Mr. NEALON: I object to that, if your Honor please. [888] That is no way to prove value, and there are several very important elements omitted, if he is going to prove that.

The REFEREE: Oh, the question may be answered.

The WITNESS: Well, on the basis of the present market it would be hard to get a cash offer for the whole tract at all.

By Mr. MACKAY:

Q. At any price?

A. Yes, sir.

Q. Let me ask you, Mr. Lilley, do you feel if you offered those lots separately that they could all be sold at a single sale?

A. I don't quite understand how you could sell them separately and have a single sale.

Q. Let me explain that. By a single sale I mean could you dump all of these lots on the market at the same time and sell all of them for cash, we will say, within a period of one week?

A. No, sir, not in my opinion.

Mr. NEALON: I object to that, if your Honor please. This is something——

The REFEREE: That is an improper question. That does not relate to any situation that would appear to arise in this case.

(Testimony of L. J. Taylor.)

By Mr. MACKAY:

Q. To sell these lots to separate purchasers in your opinion would require a considerable period of time, would it not?

A. Yes, it would.

Q. Unless they were to be sacrificed at a very low price?

A. Yes, sir.

Q. Supposing you were to dump these lots on the market, do you think that purchasers for all of them could be obtained at such prices as would aggregate as high as sixty or seventy thousand dollars, unless a more or less intensive sales campaign and advertising campaign was carried on? [889]

A. Well, I don't think they could be sold quickly at any price under the present market conditions.

Q. Under the present market conditions how long do you think it would take you to sell enough lots out there to aggregate as much as sixty or seventy thousand dollars?

Mr. NEALON: That is assuming, of course, that the present market conditions continue?

Mr. MACKAY: Yes.

Mr. NEALON: It is calling for something only the God above knows, so I don't think it is a proper question, if your Honor please. The witness cannot guess at what the values may be by the time a sale could be made as a judicial sale.

Mr. MACKAY: Of course, they might get worse instead of better.

(Testimony of L. J. Taylor.)

A. Well, I would not like to make a guess. That is a pretty wild guess to make. I would prefer not to make one upon that.

By Mr. MACKAY:

Q. In your opinion it would take some considerable time, Mr. Lilley?

A. Yes, it would.

Q. A good many months?

A. (There was no answer.)

The WITNESS: Are you waiting?

Mr. MACKAY: My question was not very much of an interrogatory. I said, "A good many months."

Q. You feel it would take a good many months to sell this property out and realize as much as sixty or seventy thousand dollars, do you not?

A. Under the present market conditions it would take a good many months to sell it at an aggregate of sixty or seventy thousand dollars, yes.

Cross Examination by Mr. Nealon

Our firm handles a great many mortgage loans and we come in contact with people defaulting on their interest because of the present financial situation. At the present time, due [890] largely to the depression, we do not accelerate mortgages and foreclose immediately. We do not feel that we are losing our security by being lenient and not compelling a strict adherence to the terms of the mortgages. I have not made calculation as to the value of this tract as a whole, based upon sales that have

(Testimony of L. J. Taylor.)

taken place there the last year that I know of within my own knowledge, but I can make it very shortly because I have been the trustee in bankruptcy. There are approximately 200 lots in these proceedings. The average sales there have been right at $600, and based upon that, the value of the whole would be $120,000.

Redirect Examination by Mr. Mackay

The sales to which I have referred have been for cash. There have been ten or eleven sales made since I have been trustee.

Mr. MACKAY: At that rate it would take about twenty years to clean out the tract, would it not?

The WITNESS: Just about.

Recross Examination by Mr. Nealon

No applications for sales were made until last May and only a few lots were offered for sale at that time. When I answered Mr. Mackay's question in which he suggested it would take twenty years to sell out this tract on that basis, I was answering his question as I understood it, that at the rate of ten lots per year it would take that long to sell 200 lots. In my opinion it would not take twenty years to sell the lots. There is no reason why, under normal conditions, this tract could not be sold. It is a beautifully located tract and well improved. It could be sold as readily as any other tract, I think. It is a well paved tract. The streets that are paved are Orange Drive, North Windsor Drive, and Wind-

(Testimony of L. J. Taylor.)

sor Boulevard and Windsor Drive are paved. Arden street, I would say [891] is 80 per cent paved, and the same of Kennemore. There is county paving on Seventh Street, and Camelback Road is county paving. Inside the tract the paving is macadam and bitulithic paving, about five inches I think. The paving on Camelback Road is concrete and that on Seventh Street and Central Avenue is concrete paving.

Redirect Examination by Mr. Mackay

Q. Mr. Lilley, you several months ago procured from this court an order authorizing you to sell this property free and clear of any liens, did you not?

Mr. NEALON: I object to that. The record is the best evidence as to that.

The REFEREE: The record is here upon that.

Mr. MACKAY: I would like to have the court rule upon the objection, please.

The REFEREE: That is objectionable. The record is here.

Mr. MACKAY: I wish to have the ruling. I wish to ask the question and have it in the record. It is explanatory, I admit, but it is in the form I wish to put it.

(There was no ruling by the Referee)

A. Yes, I think there was such an order made.

By Mr. MACKAY:

Q. Now, have you attempted to make a sale under any such order?

(Testimony of L. J. Taylor.)

Mr. NEALON: I object to that, if your Honor please. In these proceedings the pleadings filed herein show that the purpose of this hearing is to ascertain these liens—or asserted liens, so a sale could be made free and clear of liens. I further object to it on the ground that the record here shows that the respondent, Margaret B. Barringer, came into court and objected to the sale of these lots until her lien was—until her lien, as she called it, was established, so that she might [892] bid up on these lots, and I avow that the record shows that.

The REFEREE: Objection sustained.

Mr. MACKAY: An exception.

You may answer, Mr. Lilley.

A. No, there has been no effort to make a sale of the lots that we term the Barringer lots until the claim has been proven.

PROPOSED AMENDMENT No. 9.

Strike out commencing with line 10 from bottom of page 251 thereof, and continuing through to 4th line from bottom of page 252 thereof, and substitute in lieu thereof, the following:

The matter of the collection for Mrs. Barringer was first placed in our office to the best of my recollection by Mrs. Barringer's son in September, 1930. He at that time requested us to proceed to foreclose her lien under the declaration of trust. Prior to the date of adjudication in bankruptcy, which was October 25th of that year, we were furnished a vo-

(Testimony of L. J. Taylor.)

luminous file which I think was placed in our hands by Mr. Bennett. We spent considerable time, first in examining the provisions of the declaration of trust. We secured from the Phoenix Title and Trust Company a statement of the account between the beneficiary and the payee, statements of lots which had not been released, and we checked with Mr. Bennett the same matters he had in his possession, records of the same nature, or copies of them. I have forgotten which we took up first, the records in the Trustee's office or whether we first took the matter up with Mr. Bennett. We also went into the question of the interest of the corporation which was then operating a utility in connection with the subdivision. It was called the Windsor Square Improvement Company. We looked up more or less law, had [893] numerous interviews with Mr. Owens, who at that time was remonstrating with us to withhold the foreclosure proceedings, he having come to our office on numerous occasions with proposals which contemplated an extension of time within which the covenants of the beneficiary could be performed. We gave considerable attention to Mr. Owens' proposals, but failed to come to any satisfactory compromise and he then stated if we went ahead with the foreclosure suit, he would throw the entire project into bankruptcy. We took no action as to the Windsor Square Improvement Company. Subsequently, after several conferences

(Testimony of L. J. Taylor.)

with yourself (Mr. Nealon), it was determined that the claim, if any existed on behalf of the Windsor Square Improvement Company, should be presented under an order to show cause, and I think that company failed to answer the order to show cause and it was adjudged that it had no interest in the property. I suppose that appears of record in the proceedings. That action was brought by the Trustee in Bankruptcy. We spent some time in conferring with the Trustee's attorney on the procedure to be followed. We don't claim any credit for it at all. The reason we didn't foreclose the declaration of trust prior to bankruptcy was that we were too rushed in the office at the time—in the short period that you mention—to satisfy ourselves as to all of the legal problems involved and to prepare the necessary pleadings, although I might say that I did prepare a draft of a complaint. We were also deterred from pressing the matter very vigorously because of the fact that Mr. Owens was calling at the office frequently and making proposals which were not entirely unsatisfactory, and it appeared for a while that we might not foreclose for some time. It developed after half a dozen or more of these conferences that we would be unable to come to a satisfactory settlement of the matter. Mr. Owens made it clear to us that he was going to go into bankruptcy or in [894] some manner throw this scheme into bankruptcy, and having had some limi-

(Testimony of L. J. Taylor.)

ted experience in such matters, I felt if we commenced foreclosure suit, that those proceedings would be enjoined promptly by the Trustee in Bankruptcy and there would be much ado about nothing. I can't remember at what time Mr. Owens notified us that he would probably go into bankruptcy. I should say that it probably was some time before the middle of October. It was after we had been negotiating with him for some time. The fee we are asking is under the provisions of the declaration of trust, and not for any services to the estate in bankruptcy.

PROPOSED AMENDMENT No. 10.

Strike out commencing with the 10th line from the top of page 255 thereof and continuing through to 4th line from bottom of page 256 thereof, and substitute in lieu thereof, the following:

Mr. NEALON: We object to that testimony, first, upon the general grounds heretofore made to testimony in regard to conditions and under the alleged declaration of trust; and secondly, on the ground that the hypothetical question is improper in form and substance, in that it does not separate the services claimed to have been rendered prior to bankruptcy and the services rendered subsequent to bankruptcy, nor does not separate what is done merely for the benefit of A and that which may be done for the benefit of the estate in bankruptcy; third, that it assumes many facts not in evidence

(Testimony of L. J. Taylor.)

and omits many facts that are in evidence; next, that it supplies as a matter of conjecture what may take place in the future, and which may never take place, namely, that counsel for A may be successful in defeating the claim of the trustee in bankruptcy that this lien is invalid. [895]

The REFEREE: The objection is sustained, and the question may be answered under the rules.

Mr. MACKAY: And I will note an exception.

The WITNESS: I will say from the facts stated in the hypothetical question that a fair and reasonable value would be ten per cent upon the amount found, the amount owing, if the lien was to be foreclosed in that amount, or to be protected in that amount.

Cross Examination by Mr. Nealon.

Regardless of the provisions in the contract limiting the recovery to five per cent, I would think the reasonable value of the services would be there, although they might contract for a great deal more or a great deal less; but answering the hypothetical question as to the reasonable value, I would say ten per cent.

Mr. NEALON: Yes. Now, Mr. Ward, from the question asked of you, can you separate and give the reasonable value of the services prior to October 27, 1930, the testimony showing that the matter was placed in the hands of counsel in September of that year?

(Testimony of L. J. Taylor.)

Mr. MACKAY: May I interrupt you, Mr. Nealon, to state that the witness was merely examined on the hypothetical question and not on the basis of testimony which he may have heard in court here?

Mr. NEALON: Well, on cross-examination I think I have got a right to ask that question, if he can from the question answer that.

The WITNESS: Well, I would say, Judge, I sat there and heard this gentleman here speaking about what was done before. May I take that into consideration in that question?

Mr. NEALON: On my cross-examination.

The WITNESS: Yes. [896]

Mr. NEALON: Yes, you may take into consideration all that you have heard testified to in the court room.

The WITNESS: Well, as I listened to him there, if a person brings to me a suit in that sum, a great many thousands of dollars, I look first to the responsibility; second, when I found that there was a declaration of trust instead of a mortgage, and if I found also that that declaration of trust had not been recorded, I would feel right away that it required —that there was questions involved there that required a lawyer to get his nose in the law books and just stay there, time to determine what—I have drawn some several declarations of trust, and they are long and involved, to the point, and all; and if I was charging a fee, I would figure to charge

(Testimony of L. J. Taylor.)

my client—if Mrs. Barringer was my client, if that is her name, I would have said right there, "I want $5,000 for it" right there without a step, if I had to determine all those things. He says there is a declaration of trust, and as I heard his testimony back there, it was a declaration of trust providing a lien instead of a mortgage providing a lien, just a common mortgage. I heard him also say that there was some questions raised about that declaration of trust not being recorded. I would have to determine right away what that bound and whom it bound and whether I was bound by it as against creditors, and all that kind of thing. In other words, I would have to get my nose searching authorities; and I suppose Mr. Mackay and Ellinwood and Ross, who are better lawyers than I am, would get right in tip-top, head-over-heels into that right away, I know I would, and I think any other lawyer would. And I would say that the amount involved, I would hate to look into a case like that —I would say that the reasonable value of the services of that case to get right into it and assume the responsibility, would be at least $5,000 before he gets into this other. [897]

Now, I wouldn't want to say that the balance over $5,000 would be paid for the services done after that, but I was taking the whole based upon the hypothetical question that I arrived at ten per cent on. We have a theory of about ten per cent on such matters.

(Testimony of L. J. Taylor.)

Mr. NEALON: But from the testimony you heard in court what would you testify as to the value of the services rendered by Mr. Mackay and Ellinwood and Ross prior to October the 27th, 1930?

The WITNESS: Yes, assuming that this came into their office and these questions were before them?

Mr. NEALON: Yes. No, just confine your answer, Mr. Ward, to that.

The WITNESS: Yes. I said $5,000.

Mr. NEALON: $5,000?

The WITNESS: Yes.

Mr. NEALON: Now, can you from the evidence in court form a value as to the services that were rendered by the counsel with benefit to the bankrupt estate?

The WITNESS: No.

The WITNESS resuming: I haven't based my opinion on what would be the value of the services to the estate. I have based it upon the question that even if you split the services, what the reasonable value of them are.

BLAINE B. SHIMMEL

called as a witness for Respondent Barringer, testified as follows:

I am a member of the law firm of Moore and Shimmel.

(Testimony of Blaine B. Shimmel.)

Mr. Shimmel's qualifications to testify as an expert were admitted by counsel for trustee in bankruptcy.

I am generally familiar with the fees charged for services in foreclosure suits. I was present in court and [898] heard the hypothetical question which was put to Mr. Ward. I followed it pretty carefully and I think I comprehend it in a general way.

Mr. MACKAY: What would you say, Mr. Shimmel, as to the value of the services outlined in the hypothetical question which was put to Mr. Ward?

Which question was objected to by the trustee in bankruptcy for the reasons given in the objection to the same question in Mr. Ward's testimony, which objection was sustained by the Referee and an exception saved by Respondent Barringer.

The WITNESS: I would say that the minimum compensation, reasonable compensation for the services rendered in your hypothetical question would be approximately sixty-nine hundred or seven thousand dollars, being about ten per cent of the amount of the recovery, which I understood was $69,000 principal.

Cross Examination by Mr. Nealon.

I am basing my answer on the services rendered as a whole. I don't know to whom the benefit is going to accrue, whether it will accrue to anyone or not. I am not considering any special rules in bankruptcy governing the allowance of fees, as I

(Testimony of Blaine B. Shimmel.)

don't know anything about that. I would say on the abstract proposition upon the facts as contained in that question that would be my idea of the reasonable value of those services. The hypothetical question does not differentiate or name any clients. I am taking the value of the services in a legal proceeding. I wouldn't say that the services were worth any less if the litigation was unsuccessful. I did not take into consideration the nature of the results that might have been obtained in bankruptcy proceedings as differentiated from proceedings in the state court or in the federal court.

[899]

PROPOSED AMENDMENT NO. 11.

Strike out commencing with 7th line from bottom of page 275 thereof, continuing through to bottom of page 278 thereof, and substitute in lieu thereof, the following:

Cross Examination by Mr. Nealon.

At the time I was investigating or organizing the corporation, Windsor Square Development Company, I had a conference in which myself, Mrs. Barringer, Mr. Taylor of the Phoenix Title and Trust Company, and Mr. Tom Maddock participated. It took place in the little booth that was ordinarily occupied by George Mickle over at the old Title and Trust company office. I cannot recall the exact time, but it might have been two days or two weeks prior to the date of the articles of incor-

(Testimony of Blaine B. Shimmel.)

poration of the Windsor Square Development Company. The meeting was brought about by Mr. Taylor of the Phoenix Title & Trust Company and myself at the time when I represented some parties who were contemplating the taking over of the financing of the indebtedness owed by Dinsmore and others to Mrs. Barringer, Phoenix Savings Bank and Trust Company, the municipal taxes, and the office of the Phoenix Title and Trust Company itself to get at the true state of the then indebtedness. Mr. Tom Maddock was called in. He was an engineer in charge of this project and had for one reason or another, kept more or less accurate account of the moneys expended in the way of improvements and it was for the purpose of finding out what the actual value of the partially developed addition was at that time, and what indebtedness existed, comprised of matured partial payments to Mrs. Barringer, interest, a large amount of money owing to Maddock and Holmquist, and an amount of money owing to the Phoenix Savings Bank and Trust Company, for which there had [900] been several lots deposited as security. At that time we found out through Mr. Maddock's records that the improvements made were estimated to be about $90,000, with an indebtedness charged against that of $4,000 to Maddock and Holmquist, twenty-eight to thirty thousand dollars to the Phoenix Savings Bank and Trust Company, and a substantial amount

(Testimony of Blaine B. Shimmel.)

to Mrs. Barringer and to the state and subdivisions in the form of taxes.

By Mr. MACKAY:

Mr. Cunningham, I am not quite clear on this $90,000 which you stated had been incurred by Mr. Owens and his associates in connection with putting in the improvements. I believe you stated that that matter was discussed.

The WITNESS: Yes. There was an indebtedness. That was an amount of money given us by Mr. Tom Maddock as being the amount of the actual improvements in that property by reason of this promotion and subdivision that he could actually trace through figures. The $90,000 that I referred to in my testimony was an over all amount that he gave to us as being the amount in which this property was enhanced up to that time. He also said, "I can't in anywise tell you the amount of money that has been expended in the way of advertising and such as that, but, he says, "I can trace that amount, $90,000."

By Mr. MACKAY:

I don't know the exact purpose of this, your Honor. It seems to me, your Honor, we are getting hearsay evidence into the record as to the value of improvements which have been constructed by the bankrupt's predecessor in interest.

I don't know what you have in mind to establish, Mr. Nealon, but if that is the matter that you do

(Testimony of Blaine B. Shimmel.)

seek to establish, I wish to strike the last answer of the witness on the ground that it constitutes hearsay. [901]

By Mr. NEALON:

Now, if your Honor please, I think we could get along a little faster if we proceed in an ordinary, proper way.

The REFEREE: Well, it may stand subject to the objection. Proceed.

By Mr. MACKAY:

Exception.

The WITNESS resuming: It is hard for me to remember exactly, but I am quite sure that the incorporation of the Windsor Square was subsequent to this conversation at the conference I have just referred to. Nothing was said at this conference about current accounts other than this $12,000 that Tom Maddock kept talking about as owing to him and Fritz Holmquist. He insisted on that most of the time. I don't know whether the Windsor Square Development Company mantained the caretaker on the premises during the time in which the Windsor Square Development Company, Inc., took the transfer of the interest in that property to which I have referred. From my own knowledge, I don't know that the pumping of water and so forth proceeded, but from other reasons I know that it did. Technically, I guess that Windsor Square was conducted by the corporation just as it

(Testimony of Blaine B. Shimmel.)

had been done preceding that time, but actually we never knew a thing about it. We incorporated and quit. That is all we did. The reason I know about the pump going all the time, I had other interests and I knew it from that, but not as a stockholder or president of the Windsor Square. Legally I know that so far as that cost was incurred during the time that the Windsor Square took this transfer of interest that there was that liability created against the corporation, whatever it may have been; practically we didn't know anything. The current debts and the payment thereof were not discussed at any time in our dealings. The figures that I got [902] at that meeting, I presented to my principals, and that is all. They took them among themselves and talked them over, and that is all I know about it. I would like to say something by way of explanation of something that might look like a discrepancy in the record. All these negotiations only covered a matter of a few days or two or three weeks. But the matter of taking the assignment that we talked about yesterday from Owens and Dinsmore, and so forth, to the Windsor Square Development Company, and the organization of Windsor Square Development Company, all happened at one time, one day. Dinsmore was going out of town at eight o'clock that night, and went. He left that night, so it was all done one day, whatever date that was, irrespective of what date might appear in that assignment to Windsor Square Development Com-

(Testimony of Blaine B. Shimmel.)

pany. In organizing this corporation there was no plan to avoid the liabilities that the previous owners had contracted.

Redirect Examination by Mr. Mackay.

The WITNESS resuming: From the organization of this company until the transfer to Mr. Owens was made in October of 1930, the directors of the company did not meet for the purpose of authorizing its officers or agents to employ a caretaker or to incur any liability in the preservation and maintenance of Windsor Square; nor did they do so informally. The officers of the company did not assume to make arrangements for the pumping or other preservation of Windsor Square and to my knowledge, no officer or agent of the company secured any extension of credit or made any disbursement of money or other thing of value for those purposes. [903]

PROPOSED AMENDMENT NO. 12.

Strike out commencing with the 16th line from the bottom of page 316 thereof and continuing through to the 9th line at the top of page 320 thereof, and substitute in lieu thereof the following:

THOMAS MADDOCK

called as a witness for the trustee in bankruptcy, testified as follows:

Direct Examination by Mr. Nealon.

I am an engineer and have been engaged in that profession for 31 years. I have had some experience in connection with the laying out of subdivisions of real estate and the engineering features of improvements thereon. I am a member of the firm of Holmquist and Maddock, and our partnership staked out the subdivision of Windsor Square and subsequently had charge of the engineering and supervision of the construction that was done out there. We supervised the putting in of the improvements. My recollection is that we started in the early part of 1929 and continued something short of a year.

By Mr. NEALON:

Can you tell us what improvements were put in that subdivision under the supervision of your partner and yourself?

By Mr. MACKAY: I object to that on the ground that the question is irrelevant, immaterial, and incompetent for any purpose whatever, and not within the issues raised in this proceeding.

The REFEREE: The objection will be overruled.

By Mr. MACKAY: An exception.

The WITNESS: Yes, sir.

(Testimony of Thomas Maddock.)

By Mr. NEALON: Please tell them to the court, Mr. Maddock. [904]

The WITNESS: Can I refer to notes of what they were?

By Mr. NEALON:

Yes, for the purpose of refreshing your memory you may.

The WITNESS: I could not possibly remember it otherwise. Do you want all of the items?

By Mr. NEALON: Yes. I prefer the details, if you please.

By Mr. MACKAY: May the record show our objection to all questions touching upon the time of installation and the extent of the improvements in Windsor Square, on the ground they are irrelevant, incompetent and immaterial for any purpose, and incompetent for the purpose of showing any title in the bankrupt or its predecessors in interest.

The REFEREE: It may, and the ruling will be that the objection will be overruled.

By Mr. MACKAY: An exception.

The WITNESS: There was some original work there clearing and leveling the land, ditching it and so forth done by Mr. O. F. Fisher. That amounted to $685.92. A well was sunk about 450 feet deep. It cost $2,350. It was done by a man by the name of Garrison. The water pipe line system was put in by Mr. Fisher and cost $12,177.48.

By Mr. MACKAY: May I interrupt just a minute? When you say it was put in by Mr. Fisher, do

(Testimony of Thomas Maddock.)

you mean that he was the contractor in charge of that or the person who had it put in?

The WITNESS: It was all done under our direction. We were getting a percentage for superintending and engineering the construction features. These bills that I am giving you so far went through our office and were approved by us before they were paid or handled by the firm. I have three additional bills—the actual bills did not go through our office, but we got the items in order to compute our percentage upon which we submitted a bill to the firm [905]

By Mr. MACKAY: Well, when you say Fisher did a particular piece of work do you mean he was the man who actually performed the work rather than the man who had his own property improved?

The WITNESS: Oh, yes, they were either straight contract jobs or force account jobs. Some were force account jobs, in which case we checked his timekeeper's cost sheets and approved them and they went into the firm.

By Mr. MACKAY: Thank you.

By Mr. NEALON: You may proceed, Mr. Maddox.

The WITNESS: Did I give you that order—will you read the last of my statement there, please, Mr. Reporter?

(Thereupon the last statement of the witness was read aloud, as requested, as follows)

(Testimony of Thomas Maddock.)

"The water pipeline system was put in by Mr. Fisher and cost $12,177.48."

The WITNESS: Sidewalks and curbs $19246.68. Electric light standards sixty-four ninety-eight.

By Mr. NEALON: You mean $6,498?

The WITNESS: Yes, sir.

By Mr. NEALON: Pardon me.

The WITNESS: Electric light wiring, $3,169.03. The entrance posts for lights and so forth to those streets was $696. Installing of pump, tanks, motors, and so forth, $2,692. Arizona Sand and Rock Company, for sand and rock for paving, $11,784.91. Force account on paving work to Fisher, $24,246.20. Central Arizona Light and Power, $1,751.80. The same firm $1,480. Those items total $86,728.02. To which would be added our five per cent commission of $4,336.40. We did some additional work on the survey and laying out of the project, amounting to $1,328.26. The total items I am giving you here, $92,392.68. All of those bills went through our office except the Electric Light and Power Company and one for the electric light [906] standards. But we also looked after that work. It just happened the bills didn't go through us so I had to find out what those bills were from the people who did the work.

By Mr. NEALON: Was the work done then?

The WITNESS: Oh, yes. The only thing, the other items I am absolutely sure of, and these I

(Testimony of Thomas Maddock.)

got from three parties who paid us our percentage of supervision upon them. They went in and were handled direct.

By Mr. NEALON: Now, the figures you have given do not include shrubbery and certain other improvements there, do they?

The WITNESS: I don't know what you mean by "certain other" but they do not include shrubbery, trees, or anything like that.

By Mr. NEALON: Were there any other improvements that you know of made there other than those to which you have testified, Mr. Maddox?

By Mr. MACKAY: I object to the question unless it is made more specific as to when and by whom.

Mr. NEALON: I am just asking him if he knows now.

The WITNESS: I think that is all I know anything about, unless they were made subsequently.

By Mr. NEALON: Now, what in your opinion was the value of those improvements as compared with the cost thereof?

The WITNESS: I think their work was done remarkably cheap. I think all of it was—I doubt if even under the depression it could be contracted for today any cheaper than it could have been or than the force account work was done for at that time.

By Mr. NEALON: With whom did you contract for your services?

(Testimony of Thomas Maddock.)

The WITNESS: With Owens and Dinsmore.

By Mr. NEALON: Who was in possession of the contract at the time you made these improvements?

By Mr. MACKAY: I object, your Honor, on the ground that it is irrelevant, immaterial, and incompetent, and that possession [907] is no basis for proof of title in the bankrupt or his predecessors.

The REFEREE: The objection will be overruled.

By Mr. MACKAY: An exception.

The WITNESS: You mean physically, or legally, judge?

By Mr. NEALON: Physically.

The WITNESS: We were dealing with Owens and Dinsmore. They were apparently in charge of the work. They told us to go ahead and lay it out and see that the work was done. I presume they were in possession of it. I don't know.

By Mr. MACKAY: I move to strike out the answer of the witness. The witness says that he presumes but he does not know it.

The REFEREE: Yes, what is presumed may be stricken.

By Mr. NEALON: Well, as to the physical possession, who was in possession?

The WITNESS: The physical possession?

By Mr. NEALON: Yes.

(Testimony of Thomas Maddock.)

The WITNESS: (There was no answer)

By Mr. NEALON: I mean by that, Mr. Maddox, who was in charge of the property directing——

The WITNESS: (Interposing) Directing us?

By Mr. NEALON: Yes.

The WITNESS: Owens and Dinsmore.

By Mr. NEALON: What individuals came out there and gave any directions or requests or made any changes in the work?

The WITNESS: I think the only one would have been Mr. Owens, for sure, and I doubt if Dinsmore ever made a suggestion. He came out there sometimes but I don't recall any suggestions that he made.

The WITNESS Resuming: We received payments for our work from Owens and Dinsmore. I don't think I ever met Mrs. Barringer, but I have been present at meetings at the Phoenix [908] Title and Trust Company when Mr. Taylor of the Title Company and Mr. Gene Cunningham were present and additional times when Mr. Dinsmore was present. These conferences took place at the time negotiations were going on with Mr. Gene Cunningham in regard to refinancing the Windsor Square property. I was with Mr. Taylor and Mr. Gene Cunningham back and forth between their offices and Mr. Beach a half dozen times and over a period of maybe a couple of weeks. These conferences must have been about May or June, of 1930. I probably could get the date from correspondence

(Testimony of Thomas Maddock.)

I have. I, myself, had an account against the Owens-Dinsmore people at that time, and the matter of that particular indebtedness was brought up at every conference. There was a discussion of the debts that would have to be paid and taken over or taken up if they were going to take over the property, and there was an effort to see what bills could be postponed at that time. The discussion arose over the question of the minimum amount of cash necessary to handle the proposition. At this time there was approximately $1400 due to us. Mr. Owens paid us one check of $250 along about that time; a little before or a little after. If that amount had been paid at the time of these conferences, the amount due us would have been around $1400. If not, it was more than that—that difference. To a limited extent I am familiar with improvements put in various subdivisions, and I believe I am competent to pass upon the value of paving and sidewalks. As an engineer, I supervised the putting in of the pavement and other improvements on this property.

By Mr. NEALON: What, in your opinion, was the value added to the lots in Windsor Square by reason of the improvements so put in? I mean the average increase in the value per lot by reason of the improvements.

By Mr. MACKAY: I object to that on the grounds that the [909] question is irrelevant, incompetent, and immaterial for any purpose what-

(Testimony of Thomas Maddock.)

soever. It is outside of the issues involved in this proceeding.

By Mr. NEALON: If your Honor please, counsel went very urgently and strenuously into the matters of values out there to demonstrate this property would not bring $50,000.

The REFEREE: Yes.

By Mr. NEALON: Now, the testimony that I am seeking to bring out from this witness is a recognized criterion to be taken into consideration in establishing values of real estate.

The REFEREE: Yes. The objection is overruled.

By Mr. MACKAY: An exception.

The WITNESS: Why, the number of lots divided into the amount expended would give the amount per lot. Some lots are larger than others, therefore, the value of the improvements greater; the water cost is fairly equally divided, the lighting, and so forth. I think if you would take your $92,000 and divide it by the number of lots you would get an approximate figure.

By Mr. NEALON: At the time of these conversations about the refinancing of the corporation were or were not Owens-Dinsmore able to meet their obligations as they matured?

The WITNESS: (Resuming) During the time of these conversations about refinancing, Owens and Dinsmore stated they were very hard up at the time and were endeavoring to raise funds from

(Testimony of Thomas Maddock.)

other sources to carry on the work. They met their indebtedness to us as it came due by finally making an arrangement by which they transferred the title of a couple of lots to us in final payment.

PROPOSED AMENDMENT No. 13.

Strike out commencing with the 4th line from the bottom of page 329 thereof and extending through to the 4th line from [910] the top of page 333 thereof, and substitute in lieu thereof, the following:

The WITNESS (Resuming) The Phoenix Title and Trust Company handles many subdivisions in and around Phoenix and in many of those subdivisions we take a warranty deed direct to the Phoenix Title and Trust Company upon a printed form, the same as is shown in Respondent Barringer's exhibit one in evidence. A good many of these subdivisions have not any mortgage or encumbrance on them at the time we take title, but the vast majority of them have. It is not our practice if it is to be handled under a trust like this, to incorporate into the deed itself the notation as to the mortgage. I was not with the Phoenix Title and Trust Company when the Burroughs Addition which you mentioned was taken in trust. Of course, if I understand what you are driving at if there was a mortgage on the property at the time we took title, naturally it would show the mortgage as an exception on the title. If there was a recorded mortgage

(Testimony of Thomas Maddock.)

as against any property that we were handling as a subdivision and we took the deed to it, naturally we would put such a recitation in the deed. I remember there was an attempted attachment in a suit against Windsor Square while we were handling this subdivision, but I don't remember the dates or the parties to the thing. I say I do recall some attempted attachment having been made, but I don't remember the details at all. As to the Phoenix Title and Trust Company having taken any action in regard to any suits filed that might affect the Windsor Square property, as far as I know, there never was any court action of any kind. My recollection is that that attachment was released very shortly after it was attempted to be levied. I don't think there was any court action became necessary. I may be mistaken, but testifying from memory, my [911] recollection is that it was released very shortly after the attachment was recorded.

PROPOSED AMENDMENT No. 14.

Strike out commencing with 7th line from the top of page 333 thereof and continuing through to bottom of page 340 thereof, and substitute in lieu thereof, the following:

Direct Examination by Mr. Nealon

I am credit manager for the Republic and Gazette. As credit manager for the Republic, I had some dealings with Owens and Dinmore in regard to advertising concerning Windsor Square and

(Testimony of Thomas Maddock.)

extended them credit. Our claim is on file in this proceeding. Prior to the time that I extended the credit for which the claim is on file, I had dealings with Owens and Dinmore regarding credit to them in connection with the advertising in Windsor Square. Those bills were paid by Owens and Dinmore.

Mr. NEALON: In dealing with them, did you deal with them as the owners of the property or not?

To which question Respondent Barringer objected, which objection was overruled by the court, and an exception saved.

The WITNESS: We did.

Thereupon Respondent Barringer moved to strike the answer as calling for a conclusion of the witness, which motion was denied by the Referee.

The WITNESS (Resuming) I had no notice at the time I was talking with Owens and Dinmore that *Mr.* Margaret B. Barringer claimed any mortgage or lien on the premises. Respondent Barringer moved to strike the above answer upon the ground that it called for a conclusion of the witness, which motion was denied, and an exception saved. [912]

Cross Examination by Mr. Mackay

The WITNESS (Resuming) The only inquiry made by me into the ownership of Windsor Square at the time I concluded that Mr. Owens and his associates were the owners of it, was through our past dealings with Owens and Dinmore with reference to

(Testimony of Thomas Maddock.)

the property and the advertising. I considered Owens and Dinmore the subdividers of this property. This opinion was not gained by reason of the records in the office of the county recorder, nor based on anything that Mrs. Barringer or any other person purporting to act for her made to me in writing, or in any other form. We did not know Mrs. Barringer had anything to do with it. We didn't know that she even existed. We didn't check up the record title to Windsor Square. I didn't know that, until January, 1928, the record of Windsor Square stood in her name. We didn't know that there was a conveyance from Margaret Barringer conveying the property which is now Windsor Square to the Phoenix Title and Trust Company as trustee.

Cross Examination by Mr. Gust

I couldn't say without referring to the advertising whether some of the advertisements we published stated that the title was held by the Phoenix Title and Trust Company as trustee, and that deeds would be issued by the Phoenix Title and Trust Company as trustee, and that the moneys from the sales must be paid to the Phoenix Title and Trust Company. I have seen the Windsor Square Tract. I have only driven through Windsor Square and do not recall a large sign out there stating that the titles were furnished by the Phoenix Title and Trust Company, as trustee.

HENRY F. LEIBER

called as a witness on behalf of the trustee in bankruptcy testified as follows: [913]

Direct Examination by Mr. Nealon.

I have been a resident of Maricopa County for twenty-three years. My business is outdoor advertising, sign painting. I am a member of the firm of Myers-Leiber Company and we have a claim on file in this proceeding for credit extended—for moneys due us. That was for sign work and for advertising done on Windsor Square. We dealt with Owens-Dinmore in regard to putting up that sign work and advertising. As far as I know, we dealt with them in the capacity of owners.

Respondent Barringer moved to strike out the last answer of the witness, which motion was denied and an exception saved.

Mr. NEALON: Did you have any talk with Mr. Owens in regard to that property prior to the time that you extended credit thereon?

The WITNESS: Yes.

Mr. NEALON: What, if any, representations were made to you in regard to the ownership of the property—by Mr. Owens, if any?

Whereupon, Respondent Barringer objected to the introduction of any testimony tending to establish representations made by the beneficiary under the declaration of trust as to ownership on the ground that they are incompetent, irrelevant and immaterial, and that no estoppel was pleaded in

(Testimony of Henry F. Leiber.)

these proceedings, which objection was overruled, and an exception saved.

The WITNESS: Well, that he owned it; that is all. When he made these representations, he was in my office at 221 North Central Avenue. To my knowledge, there was improvement work being carried on in Windsor Square at the time we were extending credit to Owens and Dinmore. Mr. Owens was in charge of those improvements.

Mr. NEALON: Did you have any information that Mrs. Barringer was claiming a lien or mortgage upon the premises at the time that you extended credit to Owens and Dinmore on Windsor Square? [914]

Whereupon, Respondent Barringer objected, which objection was overruled, and an exception taken.

The WITNESS: I did not.

The WITNESS resuming: We were paid for some of the work we did there by Mr. Owens and Mr. Dinmore both. We got checks from both parties.

Cross Examination by Mr. Gust.

When Mr. Owens told me that he owned this property I don't think I asked him whether it was clear. He told me he had bought it and was figuring on buying the other ten acres on the corner. That is all he said about the nature of the ownership. He did not say he had paid for it in full.

Mr. GUST: He told you he had paid something upon it?

(Testimony of Henry F. Leiber.)

The WITNESS: I think that the money was paid in to the Phoenix Title and Trust Company. I went to the Phoenix Title and Trust Company. I went to the Phoenix Title and Trust Company about—well, I think it was when that bulletin contract was signed up, as to the money end of it, and I think I talked to Mr.—a short, heavy-set fellow: I think he has charge of the title department or something with the Phoenix Title and Trust Company.

Mr. NEALON: Who do you mean? Mr. Taylor?

The WITNESS: No, not Mr. Taylor. Mr. Taylor was here in the room today. I know him. I don't remember what the fellow's name was. I could tell you if I heard it.

Mr. GUST: He told you they had a trust on it there?

The WITNESS: That they what?

Mr. GUST: They had a trust on this property.

The WITNESS: No, he didn't tell me that. He told me I didn't have to worry; they would absolutely pay their bills, and they would see that the bills would be paid.

Mr. GUST: That who would pay the bills? [915]

The WITNESS: Owens-Dinmore. We done five hundred dollars' of work at one time. This is the time I went over there to find out about it.

Mr. GUST: Now, will you tell me who that man was?

(Testimony of Henry F. Leiber.)

The WITNESS: Mr.—it starts with a "B", if I am not mistaken—Barkley. Barkley is the name.

Mr. GUST: Barkley?

The WITNESS: Yes, sir, of the escrow department.

Mr. GUST: And you say that Barkley told you that they would see that the money would be paid?

The WITNESS: No, he said we didn't have to worry about it, that the money would be paid.

Mr. GUST: He didn't say that the Phoenix Title and Trust Company would see that the money would be paid, did he?

The WITNESS: Well, he left me under that impression, if the Owens-Dinsmore didn't pay it the Phoenix Title and Trust Company would. I know Mr. Barkley very well. I don't think Mr. Barkley would have mis-advised me if he didn't know what he was talking about.

Mr. GUST: Do you want to testify that he told you that the Phoenix Title and Trust Company would pay that bill?

The WITNESS: He didn't say that in that many words, no, sir. I say he left me under that impression.

Mr. GUST: Those signs that you painted, some of them disclosed the fact that the Phoenix Title and Trust Company was Trustee for that property, did they not?

The WITNESS: No, sir, it did not. I think I have a copy of some of them here. It says, "Title

(Testimony of Henry F. Leiber.)

is guaranteed by the Phoenix Title and Trust Company." I have the original copy here of the signs on the bulletin board. May I read it, your Honor?

The REFEREE: It being in question—— [916]

Mr. GUST: I have no objection.

Mr. MACKAY: I object to his reading any such. Of course, I object first to his reading something I haven't seen.

The WITNESS: Okeh. (The witness handing a paper to counsel.)

Mr. MACKAY: Thank you.

Mr. GUST: You also painted for Owens-Dinsmore upon their property, did you not?

The WITNESS: Yes, lots of them, rental property, leases for sales. They had a general brokerage or real estate office. They paid for it, too.

Mr. GUST: And was Mr. Barkley the only man you talked to at the Phoenix Title and Trust Company?

The WITNESS: Yes, sir.

Mr. GUST: What was your purpose in going and talking to him?

The WITNESS: Because I knew him very well.

Mr. GUST: You know Mr. Nealon, too. You didn't talk to him. I want to know why you went to Mr. Barkley or to the Phoenix Title and Trust Company.

(Testimony of Henry F. Leiber.)

The WITNESS: Well, I have had dealings in real estate, and when this guaranty title so on and so forth by the Phoenix Title and Trust Company, naturally, I had a reason to go there rather than to Mr. Nealon. Mr. Nealon's name was not on the bulletin board.

Mr. GUST: Was not your purpose in going there to find out what the nature of Mr. Owens' claim to that property was?

The WITNESS: No, the reason I went there was because it was a twelve hundred dollar order of signs and it was lots of signs. Correct, yes, that is why I went there.

Mr. GUST: Yes. But wasn't it your purpose to find out what the nature of his ownership was?

The WITNESS: No, I wanted more specific to get an understanding or what the line-up was, yes. [917]

Mr. GUST: That is what you went there for?

The WITNESS: Yes, sir.

Mr. GUST: And did you get it?

The WITNESS: I think I did.

Cross Examination by Mr. Mackay

Mr. MACKAY: Would you state that you have a positive recollection, Mr. Lieber, that you painted signs for Mr. Owens and his associates which described them as the owners of Windsor Square?

The WITNESS: If I may make an explanation, I will say exactly what my recollection is.

(Testimony of Henry F. Leiber.)

Mr. MACKAY: Well, I ask you first, have you a clear recollection of it?

The WITNESS: I couldn't swear to it, no, sir.

Mr. MACKAY: Well, we don't want any unsworn statements. That is all.

Redirect Examination by Mr. Nealon

The four sheets you show me marked Trustee's exhibit "C" for identification are copies of the sign work that was done. They were designed for Windsor Square—Owens-Dinsmore. These instruments were made out by Mr. Owens. We were given orders to do the work and he brought the copies in there and left them with us. The work was done in accordance with these four sheets.

Thereupon, the sheets were received in evidence over the objection of Respondent Barringer, as Trustee's exhibit "O".

TRUSTEE'S EXHIBIT O.

Said exhibit is in words and figures as follows, to-wit: [918]

PROPOSED AMENDMENT NO. 15.

Strike out commencing at the top of page 345 thereof, and continuing through to the bottom of page 347 thereof, and substitute in lieu thereof, the following:

(Testimony of Henry F. Leiber.)

The WITNESS resuming: These signs were various sizes and when they were completed, they were placed on Windsor Square. I know, for I helped to put them up.

Recross Examination by Mr. Mackay

The date appearing in the right-hand corner under the order number represented the date on which the order was placed. I certainly assumed from my dealings with Mr. Owens that Owens-Dinsmore Company were the owners of Windsor Square. I did not believe that Owens-Dinsmore was a corporation from the fact that whenever we paint signs if the company is incorporated, it always states so. Owens-Dinsmore didn't state "Owens-Dinsmore, Incorporated." It stated, "Owens-Dinsmore" only. We rendered our statements for the work that was done to Owens-Dinsmore. We didn't send bills to Mr. Mills, and did not think he was one of the owners of Windsor Square. The Owens-Dinsmore appearing on this exhibit was written by someone in the office that received the order originally. In rendering our statements, we charged this work to Owens-Dinsmore, or Windsor Square. I think that Windsor Square was charged up, if I may make an explanation, as Owens-Dinsmore, Windsor Square and the others were charged up as Owens-Dinmore—that is, any other stuff they had done.

W. H. NORMAN, JR.

called as a witness on behalf of the trustee in bankruptcy, testified as follows: [919]

Direct Examination by Mr. Nealon

I am one of the owners of the Norman Nursery which has a claim on file. The claim is for labor and plants that were put in Windsor Square on the streets and around two houses built by Owens and Dinsmore. Mr. Owens gave us instructions in regard to the work. These instructions were given in our office and also at the tract several times. Mr. Owens was out on the tract at the time we were doing the work there. At another time I might state I went to the Coast and met Mr. Owens over there and we bought the stock that went in Windsor Square. He was overseeing things and at the time he was building that house and overseeing that. The paving was in at the time. I am sure the paving was all in before we did any work out there.

Mr. NEALON: Did you have any knowledge or information in regard to there being a claim of lien by Mrs. Margaret B. Barringer against the Windsor Square property when you put these in?

To which Respondent Barringer objected and the objection was overruled and an exception saved.

The WITNESS: No, sir. I had no knowledge of it until after this claim in bankruptcy was filed, and then Mr. Owens told me that it was on file.

(Testimony of W. H. Norman, Jr.)

I had no previous dealings with Mr. Owens regarding Windsor Square before the contracting of the bill that is on file, except that we did the houses first before we put those plants around on the parkways, and Mr. Owens gave us the money on that account.

Mr. NEALON: Can you tell me the value of the improvements you put in on Windsor Square?

To which question Respondent Barringer objected, the objection was overruled, and an exception saved.

The WITNESS: I couldn't give it exactly, but I would say around fourteen or fifteen hundred dollars. It is all paid except the amount that is one file herein the claim, and was all paid to me [920] by Mr. Owens.

Cross Examination by Mr. Mackay

About the only inquiry I made to ascertain whether or not liens were outstanding against this property was rather indirect. I asked at the office of the engineer who drew the plans as to his credit there and they said he was paying up on practically everything, and it seemed quite apparent to me that he was putting in a lot of money, but I really did not make any direct inquiry. That is all my inquiry; that and the talk that I heard. We furnished some of these plants on the grounds of two houses that Mr. Owens was building. Neither

(Testimony of W. H. Norman, Jr.)

Father nor I made any examination of the records in the office of the county recorder to ascertain whether or not there were any liens against this property. We rendered our statements to Mr. Owens in the form of Owens and Dinsmore. The heading of the statement was Owens and Dinsmore, but Dinsmore was never around. The statements always went to Mr. Owens. We carried our accounts under the heading of Owens and Dinsmore, and extended our credit to them. The improvements that we referred to were all in the nature of shrubs and trees, but the bill was mostly for labor for putting them in. Most of the labor was put in on the trees around the streets and on the tract generally. The bill for putting trees and shrubs around the houses has been paid. The amount owing is entirely for those around the streets.

D. R. WHITNEY

called as a witness on behalf of the trustee in bankruptcy, testified as follows:

Direct Examination by Mr. Nealon

I am secretary and treasurer of Schmidt-Hitchcock, Contractors, and have been with that firm three years January 1st, 1932. I have had dealings with Mr. Owens in regard to [921] Windsor Square

(Testimony of D. R. Whitney.)

during that time. We have a claim on file here for some sum unpaid to the firm. When he gave the orders for materials that we furnished, Mr. Owens was in our office. I never was personally on the grounds of Windsor Square when we were furnishing him with materials.

Mr. NEALON: At the time that you furnished the materials had you any information or knowledge as to a claim of Margaret B. Barringer of a lien or mortgage upon the Windsor Square property?

Objection to this question was made by Respondent Barringer, which objection was overruled, and an exception saved.

The WITNESS: No, sir.

Mr. NEALON: Were you paid for any of the materials that you furnished out there, Mr. Whitney?

This question was objected to by Respondent Barringer which objection was overruled, and an exception saved.

The WITNESS: No, sir. The work we did out there was grading and leveling of the streets—Colter and Camelback Streets.

PROPOSED AMENDMENT NO. 16.

Strike out commencing with the 9th line from the top of page 349 thereof, continuing through to the 7th line from the top of page 357 thereof, and substitute in lieu thereof, the following:

(Testimony of D. R. Whitney.)

Direct Examination by Mr. Nealon

Mr. NEALON: Mr. Lilley, I show you exhibit "A" attached to the first account and report of Trustee, showing certain expenditures. Will you state just what those expenditures are and the purpose for which they were made?

Which question was objected to by Respondent Barringer the objection overruled and an exception saved. [922]

The WITNESS: The item of $465 was advanced to the Central Arizona Light and Power Company for line extension, and a deposit of $150 as a guarantee on the power consumption account. The other expenditures shown on this report are $21 for labor on the tract. The power extension is money advanced under an agreement with the power company which has to be returned, an accounting being made annually by the power company, the amount returned being based upon the power consumption in the tract—that is, by houses or other connections onto the line so extended. It was for extensions of the power line as it existed at the time that I took the premises over in order to furnish power to consumers who were beyond the reach of that line. These consumers had been purchasers of lots in the Windsor Square Tract, or were tenants.

Mr. NEALON: I show you, Mr. Lilley, a supplemental report to first account and report of

(Testimony of D. R. Whitney.)

trustee, dated April 22, 1931, and I call your attention to the items shown therein and ask you if you made the expenditures named therein.

To which question Respondent Barringer objected, which objection was overruled, and an exception saved.

Mr. NEALON: Will you read those into the record item by item, so that Mr. Mackay can object if he wants to?

To which Mr. Mackay objected, which objection was overruled and an exception saved.

Mr. NEALON: Limit your answer, Mr. Lilley, to the items for expenditures on the property.

The WITNESS: March the 11th, 1931, to William H. Schraeder $70 for salary as caretaker. April 6, 1931, the same party, $115.10. April the 6th, Henry Brown $3.50 labor. April 6, Central Arizona Light and Power Company, power account, $95. April 6, the Arizona Welding Works, repair water pipe line, $48.75. April the 6th, Liefgreen Seed Company for supplies, [923] $1.50. The last item I mentioned of payments to the Central Arizona Light and Power Company was for power account for pumping water to supply water to the residences in the tract, and for the watering of trees and shrubs in the parkways in Windsor Square. The three items of $100 each were fees paid to the appraisers appointed by this court.

"Mr. MACKAY: I move to strike the answer on the ground that it is wholly irrelevant, imma-

(Testimony of D. R. Whitney.)

terial, and incompetent. I don't believe the expenses of administration have any bearing on whether or not Mrs. Barringer has a lien.

The REFEREE: I was just wondering about that, as to the expenses of administration.

Mr. NEALON: If your Honor please, the Bankruptcy Act prescribes the order in which the payments shall be made, and I take it that in preparing your order in this case you will take care of the various expenses of the administration in the order prescribed in the Act. This is a part of the necessary expenses covering the administration of the property itself.

Whereupon, the motion of Respondent Barringer to strike was denied, and an exception taken.

The WITNESS resuming: E. E. Lane, to whom $100 was paid is president of the Lane-Smith Investment Company, a firm in the real estate business in Phoenix. L. R. Bailey is with the firm of Bailey and Upshaw, subdividers and real estate operators. Walter Martin is with the Greene and Griffen real estate company and the Homebuilders. I believe he is the principal stockholder in both these companies, as well as secretary and manager.

Mr. NEALON: Mr. Lilley, I show you your second account and report as Trustee, dated June 18th, 1931. I will ask you in regard to an item shown in said report of $92.17, dated May 5, 1931, purported to be made to William Schraeder, salary

(Testimony of D. R. Whitney.)

as [924] caretaker, if that amount was actually paid to Mr. Schraeder?

The WITNESS: Yes.

Mr. MACKAY: I object to that and all further questions which are asked for the purpose of showing that the Trustee has made any expenditures whatever for any purpose in connection with the care or custody of Windsor Square or the property described in the Trustee's petition; on the further ground that it is irrelevant, immaterial, and incompetent for any purpose, and has no bearing at all on the priority of Mr. Barringer's lien.

The REFEREE: Objection overruled.

Mr. MACKAY: An exception.

The WITNESS resuming: Mr. Schraeder was in my employ as Trustee in Bankruptcy of the Windsor Square property. Referring to the item dated May 5, 1931, of $69.70 to the Central Arizona Light and Power Company for operating pump, that expenditure was actually made, and it was for operating the pump upon Windsor Square for the purpose of furnishing water to the people living in that sware, and watering the tract itself. Referring to item dated May 5, 1931, for $4.50 for repair of pipe I will state that was for repairing the water system in Windsor Square. The item of June 5, 1931, for $71.41 was for power for operating the pump in connection with the water system in Windsor Square. The item of June 5, 1931, to the Arizona Welding Works for $3 was

(Testimony of D. R. Whitney.)

for repairing pipe, a part of the water system in Windsor Square. The item of June 5, 1931, for $95.71 to William Schraeder, was for salary as caretaker for labor done at Windsor Square. The item dated July 6, 1931, of $93.05 to the Central Arizona Light and Power Company, shown in the second report and account of Trustee, filed October 24, 1931, was for power used for pumping water in Windsor Square. The item of $94.71 to William Schraeder, July 6, 1931, was for money actually paid to Mr. Schraeder as caretaker for his work [925] on Windsor Square. The item dated August 4th to Central Arizona Light and Power Company for power, $92.80, was money actually expended for pumping water in Windsor Square. The item of August 4th of $174.70 to William Schraeder was for labor in Windsor Square; that was labor and material—materials purchased by the caretaker. The material was a hundred feet of hose that was used for irrigating trees. $85 was for hose and $6.70 was miscellaneous expense. The item of September 10, 1931, for $101.89 to William H. Schraeder was for money actually expended in Windsor Square for salary and supplies. There have been no other expenses and disbursements as trustee since I filed that last report.

Mr. MACKAY: I want to move to strike all of the testimony of the witness up to this point in the examination, on the grounds which were stated in various objections made to his testimony, all

(Testimony of D. R. Whitney.)

of which relates to disbursements and expenditures by the Trustee; and for the further reason that under the declaration of trust which has been introduced as Respondent Barringer's exhibit number 2, it is expressly agreed by the Trustee in Bankruptcy's predecessor in interest that he will save Mrs. Barringer free and harmless from any charges for the upkeep, improvement, and maintenance of the property.

The REFEREE: Motion denied.

Mr. MACKAY: Exception.

The WITNESS resuming: Referring to Trustee's exhibit "A" in evidence, being a lithographed map, I am familiar with the property shown on that map and know the location of Colter Street with reference to the lines of the property in Windsor Square, as represented on the map. Colter Street is the North boundary. Seventh Street is the east boundary of the tract. Camelback Road is the south boundary for about three-quarters [926] of the way and Windsor Boulevard for about a quarter of the distance. Those are as shown on the map which I have shown you, which is Trustee's exhibit "A". The west boundary of the tract is Central Avenue. Central Avenue does not extend along the entire west boundary, but only the north half of it. The south half is bounded by an open tract which lies between Windsor Square and Central Avenue. It is a tract of approximately ten acres which does not belong to the

(Testimony of D. R. Whitney.)

subdivision. To the best of my knowledge, Windsor Boulevard, Windsor Drive, North Windsor Drive, Arden Street, Hermosa Drive, and Kenmore Drive are correctly represented on the map as to location.

Mr. NEALON: Is this the map which you have used in your work in connection with appraisal and sales in this tract?

This question was objected to by Respondent Barringer which objection was overruled and an exception saved.

The WITNESS: Yes, I have used this same copy for reference, or, I should say, a copy of the same map, I guess. I produced this exhibit myself in the courtroom. It was furnished to me by Mr. Owens, with a number of other copies; all identical.

Mr. NEALON: Now, have you been in possession of this property during all the time which you have been Trustee in Bankruptcy of this estate?

Respondent Barringer objected to this question which objection was overruled, and an exception saved.

The WITNESS: Yes.

Mr. NEALON: Has anyone questioned your possession during that period, Mr. Lilley?

The WITNESS: No, sir.

(Testimony of D. R. Whitney.)

Cross Examination by Mr. Mackay

The Trustee in Bankruptcy has other property in Windsor Square in which he is interested other than the lots described [927] in the petition in this hearing. Those lots have been frequently referred to as the bank lots. The various expenditures in connection with securing power for pumping and for labor, and for care and maintenance of Windsor Square generally, were made for the purpose of caring for all the lots which were turned over to me as Trustee in Bankruptcy, including the so-called "bank" lots. At the time of making these expenditures, I knew that Mrs. Barringer had filed a claim here in the court. At that time I knew that the Title and Trust Company were trustee, and that Mrs. Barringer claimed that under the provisions of the declaration of trust, she was given a lien to secure an $85,000 note of one Tunney. I don't know that I ever went into it as to what the so-called declaration of trust did provide. I never read it. I knew by hearsay only that the Barringers at one time prior to bankruptcy, owned the property. I had heard that the Barringers had conveyed the property to the Title and Trust Company under a trust arrangement. I had not been told by anyone that the sale was outright, and that she had been paid in full. I had heard that these purchasers had not paid all cash for the property at the time they made the purchase.

(Testimony of D. R. Whitney.)

By "purchasers" I refer to Owens and his associates. I have stated that I have been in possession of the property described in the schedule of assets in this estate, and have been operating the pump and the water supply system, and have been caring for the trees that are in the parkway. I don't think any of the trees are on the lots. We have made an attempt to keep the unsold lots free from weeds and we have killed a lot of rodents out there. I have managed the property just the same as any other subdivision I have charge of. I am not living on the property, but I have spent a lot of time there. I have been there a number of times. I don't know how many. I have been [928] there for the purposes of directing the care for and looking after the property. The possession that I have taken there was under order of the court to act as Trustee to administer the estate of the bankrupt.

Mr. MACKAY: Well, I am speaking of the actual, physical possession that you have taken. Under that possession have you done anything further than to care for and repair the property and perhaps go over it for the purpose of ascertaining its value and perhaps affecting sales of certain portions thereof?

The WITNESS: Well, I don't know how to answer that question, because when you sell real estate you don't go out and pick it up and hand it to somebody; you convey it by instrument in

(Testimony of D. R. Whitney.)

writing; and I haven't been out there and hoed any weed or repaired any pipe lines personally, no.

Mr. MACKAY: Well, I understand that.

The WITNESS: I have been in possession of the property the same as I have been in possession of any other property that I have charge of or own.

Mr. MACKAY: Your general possession which you have lots which you have listed with your company for sale?

The WITNESS: No, it has been very different from lots that are listed for sale.

Mr. MACKAY: Well, now, so far we have ascertained that you have been in possession of the pump and that you have repaired pipe and you have generally seen that the property was supplied and that the necessary electricity therefor was obtained from the power company and that you removed some weeds and I suppose your man Schraeder perhaps has kept the streets clean and he has watered the trees. I want to find out what else you have done.

The WITNESS: Well, I would class that more as operating the property. [929]

Mr. MACKAY: Well, I am not asking you as to your opinion as to what your acts constitute, Mr. Lilley; I am asking you what in addition to those things you have done which might be in your mind a taking of possession.

(Testimony of D. R. Whitney.)

The WITNESS: I don't think I have done anything more.

Mr. MACKAY: You think that that pretty well covers the field so far?

The WITNESS: I think so.

Mr. MACKAY: Perhaps I didn't make myself clear about your going over the property and ascertaining its value and perhaps looking it over for the purpose of selling it. I suppose that at the time the bank lots were up for sale that you went out there to see where the lots were and have in mind seeing what their value was?

The WITNESS: No, I checked that from the plat. I knew all of the property and I had a very good idea of values of all the lots in the different locations. I had gone over it previously. I didn't do that each time a lot was offered for sale.

Mr. MACKAY: Are you familiar with the provisions of the declaration of trust that is in evidence?

The WITNESS: No, I am not.

Mr. MACKAY: It is therein provided that the only possession which Mr. Owens, or, rather, the beneficiary should have should be for the purpose of performing his covenants in regard to the repairing and maintenance of the property and also for the purpose of effecting sales of the lots. Were you familiar with that provision?

The WITNESS: No.

(Testimony of D. R. Whitney.)

The WITNESS resuming: I never read the declaration of trust; I don't know what was in it; and I didn't consider that I was in possession under the declaration of trust, I was in [930] possession under the order of this court. I depend solely upon the order of the court for my possession. There were no instruments turned over to me by the bankrupt. I do not claim any right of possession under and by virtue of the declaration of trust which has been introduced in evidence.

Whereupon, the witness Lilley was called to testify as his witness by Mr. Gust for respondents Phoenix Title and Trust Company.

The WITNESS resuming: Referring to Trustee's exhibits "P" and "Q" in evidence, these are orders confirming sales based upon a report I had made of lots which I had sold. I received deed I think from the Phoenix Title and Trust Company, as trustee, covering all of these lots, but I don't remember the date. I presume that they were received before this confirmation, but I wouldn't swear to that, as I don't remember. The Phoenix Title and Trust Company as trustee did some time deed me, as trustee in bankruptcy, these lots. I don't recall having made any agreement in writing with the Phoenix Savings Bank and Trust Company, or with the Phoenix National Bank, and if I have, it has been under order of the court. I have made no contract agreement with the bank in regard to what is to be done with the proceeds

(Testimony of D. R. Whitney.)

of the sale of lots. I haven't seen any such agreement made by my attorney for me.

Mr. GUST: Have you received the money that you say these lots were sold for there?

The WITNESS: I have received payment for certain of the lots in full and the others I have received no further payment than the initial payment that was put in at the time of the bid. I can give you the ones that have been paid in full, if you care for it.

Mr. GUST: No, I don't care for that. [931]

Mr. GUST: Well, then, Mr. Lilley, what I want to know is what kind of deal you have with the Phoenix Savings Bank and Trust Company, under which you are selling these lots.

Which question was objected to by Mr. Nealon for the Trustee in Bankruptcy, as not tending to prove any issue in the case. Whereupon, the objection was sustained by the Referee as going outside of the record and the matters in issue at this hearing, to which ruling of the Referee an exception was taken by Mr. Gust for the Phoenix Savings Bank and Trust Company.

Recross Examination by Mr. Mackay

Under the order of the court, I made a sale of certain lots other than these that are described in the petition filed for this hearing. They were the so-called "bank" lots and in consummation of that sale as trustee for this estate, I executed and

(Testimony of D. R. Whitney.)

delivered deeds to the purchasers. Those deeds were executed solely by myself as trustee. I did not procure any other grantor to execute and deliver to such purchasers any deeds or other evidence of transfer of title.

Thereupon, an objection on behalf of the trustee in bankruptcy to any further testimony concerning the so-called "bank" lots as being improper cross-examination and entirely outside the issues in this case was sustained by the Referee.

Mr. MACKAY: Well, please note the respondent's exception, and at this time we will avow that by this witness we can prove that in effecting sales of the so-called bank lots he procured conveyances to be made of the legal title by the Phoenix Title and Trust Company.

The request to prove under this avowal was denied by the Referee and an exception saved by Mr. Mackay for Respondent Barringer. Whereupon, the witness Lilley was excused.

Mr. NEALON: Now, I offer in evidence all the claims that have [932] been filed in these proceedings. If counsel wants them offered separately, we will have to do it. I see no reason why they should not be offered as a whole, however.

Whereupon, Respondent Barringer objected to the introduction of any claims of creditors upon the ground that they were incompetent, irrelevant and immaterial, and had no bearing upon the issues involved in this proceedings, which objection was

(Testimony of D. R. Whitney.)

overruled and an exception saved by Respondent Barringer. Said creditors' claims were thereupon received in evidence as Trustee's exhibit "R", it being stipulated by counsel that certified copies might be substituted in the record for the original claims.

PROPOSED AMENDMENT NO. 17.

Strike out beginning with 11th line from bottom of page 359, continuing through to bottom of page 361 thereof, and substitute in lieu thereof, the following:

WITNESSES IN REBUTTAL ON BEHALF OF RESPONDENT BARRINGER.

L. J. TAYLOR

recalled in rebuttal on behalf of Respondent Barringer, testified as follows:

I have in my custody as secretary of the Phoenix Title and Trust Company, a communication from Owens-Dinsmore and Mills, in the month of January, 1929, advising our company to pay a commission to persons on sales of lots in Windsor Square.

Thereupon the witness produced the document, which was thereupon marked Respondent Barringer's Exhibit No. 13 for identification. [933]

The WITNESS resuming: This instruction was handed to me by Mr. Owens after I had prepared it. I am quite satisfied it was signed in my presence

(Testimony by L. J. Taylor.)

by Owens and Dinsmore. As to Mr. and Mrs. Mills, it was not, but Mrs. Owens and Mrs. Dinsmore were over here at various times, and they signed instruments in my presence. As to whether this is the true signature of all the persons who have subscribed it, I cannot say as to Mills. Mr. Owens told me it had been signed. Referring to Respondent Barringer's exhibit 9 in evidence and bearing the signature of S. W. Mills appearing thereon, I would say that the signature of S. W. Mills appearing on exhibit Number 13 for identification is written by the same person who signed his name to Respondent's exhibit number 9 in evidence.

Thereupon, Respondent Barringer's exhibit number 13 for identification was received in evidence as

RESPONDENT BARRINGER'S EXHIBIT NO. 14.

PROPOSED AMENDMENT NO. 18.

Strike out lines 2 to 14 inclusive, on page 361 thereof, for the reason and upon the ground that matter included therein is incomplete, incorrect, misleading and not a statement of the facts appearing in said exhibit, but a statement of the conclusions of counsel; and demand is made that said record be amended by inserting in lieu of said lines 2 to 14, the said exhibit 14 in haec verba.

(Testimony by L. J. Taylor.)

PROPOSED AMENDMENT NO. 19.

Strike out lines 9, 10, 11, 12 and 13 on page 362 thereof, and substitute in lieu thereof, the following: [934]

The WITNESS resuming: I have in my possession a communication from Owens-Dinsmore Company, dated October 16, 1930, in which a waiver of such commission is made."

Thereupon the witness produced the statement referred to and it was received in evidence as

RESPONDENT BARRINGER'S EXHIBIT NO. 16.

PROPOSED AMENDMENT NO. 20.

Strike out lines 13 to 22 inclusive, on page 362 thereof, for the reason and upon the ground that matter included therein is incomplete, incorrect, misleading and not a statement of the facts appearing in said exhibit, but a statement of the conclusions of counsel; and demand is made that said record be amended by inserting in lieu of said lines 13 to 22, the said exhibit 16 in haec verba.

PROPOSED AMENDMENT NO. 21.

Strike out commencing with the 7th line from the bottom of page 362, and continuing through the first 7 lines of page 363 thereof, and insert in lieu thereof, the following:

(Testimony by L. J. Taylor.)

The WITNESS resuming: Since execution of the Declaration of Trust the Phoenix Title and Trust Company has executed numerous contracts for the sale of lots in Windsor Square. I have identified a stock form of such contract as the one regularly used and it has been introduced in evidence by someone. Before executing sales contracts, the Owens-Dinsmore Company would sign an instruction to us that a certain lot had been sold, giving us the name of the customer and the amount of the sales price [935] and the conditions as to taxes and water assessments under which the contract was to be made, and based upon that we would enter into the contract. In most of the cases we received the down payment from the Owens-Dinsmore Company. I think in a few instances the buyers would come in and make their own down payment to us. Where the latter was done, we executed the receipt in the name of the purchaser reciting it was paid by the Owens-Dinsmore Company.

PROPOSED AMENDMENT NO. 22.

Add, following the end of page 202 thereof, the following:

Said deed was acknowledged by Margaret B. Barringer and D. M. Barringer, in Philadelphia County, Pennsylvania, on January 5, 1929, and recorded in Maricopa County, Arizona at the request of the Phoenix Title and Trust Company, on January 14, 1929.

(Testimony by L. J. Taylor.)

PROPOSED AMENDMENT NO. 23.

On page 217 thereof, in the 8th line from the bottom of the page, insert, after the word "payment", the words, "of any principal or interest of the debt secured hereunder beyond the time".

PROPOSED AMENDMENT NO. 24.

Strike out lines 14 to 23 inclusive, on page 228 thereof, objection to which matter is made on the ground that it is incomplete, incorrect and misleading, and does not correctly [936] state facts set up in said exhibit, and the references therein made are incorrect.

PROPOSED AMENDMENT NO. 25.

Strike out the proposed statement of Trustee's exhibit "C" covering the last 3 lines on page 304 thereof and the first 6 lines of 305 thereof, for the reason that the same is incomplete, incorrect, misleading and does not state the true facts appearing on said exhibit, but conclusions of counsel which are erroneous, and does not show the endorsement of the recordation shown on said exhibit; and demand is made that in lieu of said matter stricken, said exhibit be copied verbatim in said record so far as the order itself is concerned and the endorsements of filing and recording thereof.

(Testimony by L. J. Taylor.)

PROPOSED AMENDMENT NO. 26.

Strike out the proposed statement of Trustee's exhibit "D" covering lines 9 to 15 inclusive of pages 305 thereof, for the reason that the same is incomplete, incorrect and misleading, and does not set forth facts appearing on said exhibit, but counsel's conclusions therefrom; and demand is made that in lieu of said matter stricken, Trustee's exhibit "D" be copied in the record verbatim showing endorsements of filing and recording.

PROPOSED AMENDMENT NO. 27.

Strike out proposed statement of trustee's exhibit "G" covering last 2 lines on page 314 and first 7 lines on page 315 thereof, for the reason that same is incomplete, incorrect and [937] misleading, and not a statement of facts appearing on said exhibit and material matter is omitted therefrom; and demand is made that in lieu of said matter stricken, said exhibit be copied in the record verbatim except as to the description of lots included therein, which may be referred to as the lots covered in this proceeding; and demand is made that said order comprised in said exhibit "G" be given verbatim and in full.

PROPOSED AMENDMENT NO. 28.

Strike out proposed statement of Trustee's exhibit "H" covering the last 11 lines on page 315

(Testimony by L. J. Taylor.)

thereof and continuing through to the middle of page 316 thereof, for the reason that same is incomplete, incorrect and misleading, and not a true statement or summary of said exhibit; and demand is made that in lieu of said matter stricken, there be inserted a verbatim copy of said exhibit showing valuation as given on said exhibit of all lots, contracts, etc.

PROPOSED AMENDMENT NO. 29.

Strike out proposed statement of Trustee's exhibit "I" being lines 10 to 19 inclusive, on page 322 thereof, for the reason that the same is incomplete, incorrect and misleading, and not a true, full and accurate statement of said exhibit; and demand is made that in lieu thereof said exhibit be copied verbatim in the record, except as to the oath appearing thereon.

WHEREFORE, George E. Lilley, as Trustee in Bankruptcy of Windsor Square Development Inc., a corporation, Bankrupt, prays that his objections and amendments to said proposed Statement [938] of Evidence be sustained, and that said proposed Statement of Evidence as lodged herein, be not settled and allowed.

Dated June 30th, 1936.

THOMAS W. NEALON,
ALICE M. BIRDSALL,
Attorneys for George E. Lilley, Trustee in Bankruptcy of Windsor Square Development, Inc., a corporation, Bankrupt.

[Endorsed]: Received copy of the within this 30 day of June, 1930.

ELLINWOOD & ROSS,
WM. H. MACKAY,
Attorneys for Margaret B. Barringer and Phoenix Title & Trust Company.

[Endorsed]: Filed Jun 30 1936. [939]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR PRESENTATION, APPROVAL, SETTLEMENT AND FILING OF STATEMENT OF EVIDENCE, IN ACCORDANCE WITH EQUITY RULE 75, AND EXTENDING TIME FOR FILING THE RECORD AND DOCKETING CASE ON APPEAL TO THE UNITED STATES CIRCUIT COURT FOR THE 9TH CIRCUIT.

It appearing to the undersigned United States District Judge that it is necessary to protect the rights of the parties in the above entitled cause,—

IT IS ORDERED that the time within which

respondents Margaret B. Barringer and Phoenix Title and Trust Company may present, obtain approval and settlement, and file the Statement of Evidence, as required by Equity Rule 75, and the time within which said respondents may file the record and docket their case on appeal to the United States Circuit Court for the 9th Circuit, be and the same hereby are, each respectively, extended until and including the 15th day of October, 1936.

Dated this 6th day of July, 1936.

F. C. JACOBS,
United States District Judge.

[Endorsed]: Filed Jul 20, 1936. [940]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR PRESENTATION, APPROVAL, SETTLEMENT AND FILING OF STATEMENT OF EVIDENCE, IN ACCORDANCE WITH EQUITY RULE 75, AND EXTENDING TIME FOR FILING THE RECORD AND DOCKETING CASE ON APPEAL TO THE UNITED STATES CIRCUIT COURT FOR THE 9TH CIRCUIT.

It appearing to the undersigned United States District Judge that it is necessary to protect the rights of the parties in the above entitled cause,—

IT IS ORDERED that the time within which

respondents Margaret B. Barringer and Phoenix Title and Trust Company may present, obtain approval and settlement, and file the Statement of Evidence, as required by Equity Rule 75, and the time within which said respondents may file the record and docket their case on appeal to the United States Circuit Court for the 9th Circuit, be and the same hereby are, each respectively, extended until and including the 15th day of October, 1936.

Dated this 10th day of July, 1936.

DAVE W. LING,
United States District Judge.

[Endorsed]: Filed Jul 20, 1936. [941]

May 1936 Term At Tucson

MINUTE ENTRY
of Monday, September 14, 1936.

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Cause.]

Motion to Make Trustee's Objections to Proposed Statement of Evidence more Definite, Certain and Specific, and Motion of Respondents, Margaret B. Barringer and Phoenix Title and Trust Company to Require Trustee to make Objections to Proposed Statement of Evidence More Definite, Certain and Specific, come on regularly for hearing this day.

Messrs. Ellinwood and Ross, by William H. MacKay, Esquire, appear as counsel for Respondent, Margaret B. Barringer.

Messrs. Kibbey, Bennett, Gust, Smith & Rosenfeld, by L. D. Divelbess, Esquire, appear as counsel for Respondent, Phoenix Title and Trust Company.

Thomas W. Nealon, Esquire, appears as counsel for Trustee, George E. Lilley.

Argument is now had by respective counsel, and

IT IS ORDERED that said Motions be submitted and by the Court taken under advisement. [942]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

On filing and reading the application filed herein by Margaret B. Barringer for leave to commence a plenary suit against George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., and good cause appearing in said petition for a speedy hearing on said application, it is hereby ordered that George E. Lilley, as Trustee in Bankruptcy of Windsor Square Development, Inc., shall appear before this court, in the courtroom thereof, on the 2nd day of November, 1936, at 10 o'clock in the forenoon of said day, and show cause, if any there be, why the said application should not be granted; it is further ordered that a copy of this order, together with copies of said petition and the proposed complaint

filed therewith shall be served upon said George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., or upon his counsel of record in said Cause No. B-570, in Bankruptcy, pending in this court.

Done in open court this 28th day of October, 1936.

DAVE W. LING,
United States District Judge.

[Endorsed]: Filed Oct 28 1936. [943]

October 1936 Term — At Phoenix

MINUTE ENTRY
of Thursday, October 29, 1936
HONORABLE DAVE W. LING,
United States District Judge, Presiding.

[Title of Cause.]

Motion of Respondents, Margaret B. Barringer and Phoenix Title and Trust Company to require George E. Lilley as Trustee in Bankruptcy to make Trustee's Objections to Proposed Statement of Evidence, more Definite, Certain and Specific, and Motion of Respondents, Margaret B. Barringer and Phoenix Title and Trust Company to require George E. Lilley as Trustee in Bankruptcy to make Objections to Proposed Statement of Evidence, more Definite, Certain and Specific, having heretofore

been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that said Motions be denied. [944]

October 1936 Term In Phoenix

MINUTE ENTRY
of Monday, November 2, 1936

HONORABLE DAVE W. LING,
United States District Judge, Presiding.

[Title of Cause.]

HEARING ON PETITION FOR LEAVE TO SUE TRUSTEE.

The petition of Margaret B. Barringer for leave to sue the Trustee in Bankruptcy comes on regularly for hearing this day, pursuant to Order to Show Cause.

William H. MacKay, Esquire, appears as counsel for the petitioner, and Alice M. Birdsall, Esquire, and Thomas W. Nealon, Esquire, appear as counsel for Trustee.

Argument is now had by respective counsel, and

IT IS ORDERED that said petition be submitted and by the Court taken under advisement. [945]

October 1936 Term In Phoenix

MINUTE ENTRY
of Wednesday, November 4, 1936

HONORABLE DAVE W. LING,
United States District Judge, Presiding.

[Title of Cause.]

ORDER DENYING PETITION FOR LEAVE TO SUE TRUSTEE.

The petition of Margaret B. Barringer for leave to sue the Trustee in Bankruptcy having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered same, and being fully advised in the premises,

IT IS ORDERED that said petition be, and the same is hereby, denied, and that an exception be entered on behalf of the petitioner. [946]

[Title of Court and Cause.]

MOTION TO VACATE ORDER SETTLING, CERTIFYING AND ALLOWING STATEMENT OF EVIDENCE ON APPEALS.

COMES NOW George E. Lilley, as Trustee in Bankruptcy of Windsor Square Development, Inc., a corporation, Bankrupt, appellee, and moves this Court for an order vacating the order signed and filed herein on the 29th day of October, 1936, settling,

certifying and allowing statement of evidence on appeals, and as grounds for said motion, states:

1. That said order was improvidently and erroneously made, for the reason that no notice of the time and place of presentation to the court or judge of the proposed statement of evidence and the objections and proposed amendments thereto of said George E. Lilley, which objections and proposed amendments were lodged in the Clerk's office on June 30, 1936, has ever been served upon [947] counsel for appellee George E. Lilley, and no opportunity was given to said counsel previous to the entering of said order to present their objections and to be heard in said matter of settling said statement of evidence; all in direct contravention of Equity Rule 75 and Rule 38 of the District Court of Arizona; that counsel for appellee George E. Lilley were not present when said order was made and had no knowledge thereof prior to receiving notice of the entering of said order by the Clerk.

2. That the objections and proposed amendments of appellee George E. Lilley, Trustee in Bankruptcy, lodged herein on the 30th day of June, 1936, have never been passed upon by the Court or Judge, and no order has been made thereupon.

3. That no copy of said statement of evidence, as finally settled and allowed by said order of October 29, 1936, has ever been served or presented to counsel for appellee George E. Lilley, Trustee as aforesaid, and that counsel for said appellee had no opportunity to examine the same and to present objections and exceptions thereto, or even to ascer-

tain in what manner said proposed statement of evidence as originally lodged in the Clerk's office has been altered and changed, nor to find out what the same contains at the present time.

4. That no copy of said order of October 29, 1936, certifying and allowing said statement of evidence was ever served upon counsel for this appellee and counsel for this appellee have had no opportunity to object to the same and to the form thereof and to take exceptions thereto.

5. That said order of October 29, 1936, settling, certifying and allowing statement of evidence on appeals is incorrect and misleading, and assumes to state matters concerning the record which are not correct, and of which the Judge who signed said order could have no knowledge because he was not the trial judge in said proceeding. [948]

6. That the Honorable Dave W. Ling, District Judge, was without jurisdiction to settle said proposed statement of evidence and the objections of this appellee made to the whole thereof, and the amendments proposed to the so-called "condensed statement of evidence" contained therein, for the reason that he was not the trial judge and had no knowledge of the proceedings in said matter, nor of the evidence which was presented to and considered by the trial judge, nor of other matters taking place in the course of the proceedings before the District Court; that the trial judge in said proceeding was the Honorable F. C. Jacobs, and that said trial judge has since the lodging of said statement of evidence and the objections and proposed amendments

thereto, been at all times in the District of Arizona, and ready, willing and able to pass upon the matters presented by said proposed statement of evidence and the objections and proposed amendments thereto of said George E. Lilley, and to settle said statement of evidence; that said trial judge alone has knowledge of the proceedings and of the matters brought before him upon which his order and judgment from which said appeals are attempted to be prosecuted, was based; and that matters and things are contained in said statement of evidence which are incorrect and inaccurate and no part of a statement of evidence, and are incorrectly and erroneously certified by a judge other than the trial judge as a part of the evidence considered by said trial judge in rendering his judgment; that counsel for appellee George E. Lilley had no notice or knowledge that said Honorable Dave W. Ling, District Judge, would settle said statement of evidence, and had no opportunity to take exception to his action in the premises.

7. That insertions and changes have been made in the proposed statement of evidence as originally lodged in [949] the Clerk's office without any application to the court therefor and without any service or notice of such changes having been given to this appellee George E. Lilley, and that said statement of evidence as settled and certified contains matters which have never been presented to appellee in any form, and were no part of any amendments proposed by this appellee.

This motion is based on all the records and proceedings herein, and on the affidavits hereto attached.

THOMAS W. NEALON
ALICE M. BIRDSALL
Attorneys for George E. Lilley, as Trustee in Bankruptcy of Windsor Square Development, Inc., a corporation, Bankrupt, Appellee. [950]

[Title of Court and Cause.]

AFFIDAVIT OF COUNSEL.

State of Arizona
County of Maricopa—ss:

THOMAS W. NEALON and ALICE M. BIRDSALL, being each duly sworn, on oath, each for himself and herself and not one for the other, depose and says:

That we are counsel for George E. Lilley, Trustee in Bankruptcy of Windsor Square Development, Inc., a corporation, Bankrupt, an appellee in the appeals being now and since the 5th day of February, 1935, attempted to be prosecuted by Margaret B. Barringer from the order of the Honorable F. C. Jacobs, District Judge, affirming the order and decree of the Referee in Bankruptcy in Bankruptcy Proceedings No. B-570, In the Matter of Windsor Square Development, Inc., a Corporation, Bankrupt, fixing and marshaling liens, determining

priority [951] thereof and adjudging certain asserted liens and interests null and void;

That on the 6th day of May, 1936, said appellant Margaret B. Barringer served upon us and lodged in the office of the Clerk of the United States District Court for the District of Arizona her proposed statement of evidence consisting of two volumes, containing 364 typewritten pages; that thereafter an order was made by the Honorable F. C. Jacobs, District Judge, granting George E. Lilley, Trustee in Bankruptcy as aforesaid, until the 1st day of July, 1936 in which to examine said proposed statement of evidence and submit and lodge any objections and proposed amendments thereto; that on the 30th day of June, 1936, said George E. Lilley, Trustee as aforesaid, served upon counsel for Margaret B. Barringer and lodged in the Clerk's office objections to said proposed statement of evidence and amendments to the "condensed statement of evidence in narrative form" contained therein; that shortly thereafter counsel for Margaret B. Barringer requested counsel for said George E. Lilley, Trustee as aforesaid, to agree upon a date in the early part of July at which time the said proposed statement of evidence and objections and amendments proposed thereto, might be presented to the Honorable F. C. Jacobs at Prescott, Arizona, where said Honorable F. C. Jacobs was staying at said time; that counsel consented thereto and said time was agreed upon with said counsel and with said Honorable F. C. Jacobs; that shortly before said

time agreed upon, counsel for Margaret B. Barringer served upon counsel for George E. Lilley, Trustee as aforesaid, a motion to make the objections of said George E. Lilley, Trustee as aforesaid, to the proposed statement of evidence more definite and certain, and said counsel for Margaret B. Barringer stated that he did not intend to take [952] up the settling of said statement of evidence at said time agreed upon with Honorable F. C. Jacobs, and on the 6th day of July, 1936, said counsel for Margaret B. Barringer presented to said Honorable F. C. Jacobs an Order Extending Time for Presentation, Approval and Settlement and Filing of Statement of Evidence and Extending Time for Filing and Docketing Record on Appeal to and including October 15, 1936, which order was signed by Honorable F. C. Jacobs, and was filed by said counsel for Margaret B. Barringer on July 20, 1936:

That we received notice that on the 14th day of September, 1936, said motion of Margaret B. Barringer to make more definite and certain the objections and proposed amendments to said proposed statement of evidence made by said George E. Lilley, Trustee as aforesaid, would be heard upon the motion docket of the Honorable Dave W. Ling in the District Court at Phoenix, Arizona; that we were present at said time and said motion was argued and submitted to the Court.

That no notice of any attempt or proposal to present said proposed statement of evidence and the objections and proposed amendments thereto of said

George E. Lilley, Trustee as aforesaid, to the Court for settlement and approval was ever given to us, or either of us, as required by the provisions of Rule 38, Rule of Practice of the District Court of Arizona, which provides as follows: "After the expiration of the time allowed, the bill and AMENDMENTS shall be presented to the judge for settlement UPON NOTICE TO THE ADVERSE PARTY." That counsel for said George E. Lilley, Trustee as aforesaid, relying upon this provision of Rule 38 expected to be present at an oral hearing before the judge who would finally settle the statement of evidence. [953]

That it has been and now is the opinion of counsel for appellee George E. Lilley, Trustee as aforesaid, that where the trial judge is within the Federal District wherein the cause was tried and he is ready, able and willing to settle the statement of evidence, that jurisdiction for that purpose vests in him alone; that the cases in which such a statement of evidence may be settled by another judge are only confined to those where by reason of death, absence from the district, or like disability the judge who tried the cause is unable to settle the same, and that in cases where such circumstances exist it becomes necessary for the judge settling such bill of exceptions to take testimony as to the facts and proceedings had in the trial and in subsequent review; the foregoing being based on cases wherein a statement of evidence was settled by a judge other than the one who tried the case, by reason of the fact that the trial judge had died pending proceedings on ap-

peal and prior to the settling of the statement of evidence.

That the record in the pending matter is long and complicated; that in the hearings before the Referee and before the Judge upon review many things occurred which are not preserved in the Reporter's Transcript, and for this reason the Judge who tried the cause has a familiarity with the essential matters that were presented to him, which could only be obtained by another judge by the taking of testimony.

Deponents further say that Honorable F. C. Jacobs who heard and determined said cause is now and has been at all times since the 30th day of June, 1936, in the Federal District of Arizona, and since that time has not been laboring under any disability, physical or otherwise, that would prevent him from hearing and determining all questions that might arise upon a [954] settlement of such statement of evidence, and that he has during all of said period been ready, willing and able to examine the same and settle any disputed questions in regard thereto.

THOMAS W. NEALON
ALICE M. BIRDSALL

Subscribed and sworn to before me this 4th day of November, 1936.

[Seal] FRANCES M. GARDNER
Notary Public

My Commission expires April 5, 1938.

[Endorsed]:

Received copy of within motion to Vacate Order settling, certifying and order allowing statement of evidence on appeals, this 4th day of November, 1936.

ELLINWOOD & ROSS
WM. H. MacKAY
Attorneys for
Margaret B. Barringer

[Endorsed]: Filed Nov 4 1936. [955]

[Title of Court and Cause.]

ORDER SETTING MOTION OF TRUSTEE TO VACATE ORDER SETTLING STATEMENT OF EVIDENCE FOR HEARING.

On application of Wm. H. MacKay, Esq., one of the attorneys for respondents Margaret B. Barringer and Phoenix Title and Trust Company, a corporation, and good cause being shown—

IT IS ORDERED that hearing shall be had on Motion to Vacate Order Settling, Certifying and Allowing State of Evidence on Appeals, heretofore filed herein by George E. Lilley, as Trustee in Bankruptcy of Windsor Square Development, Inc., shall be and the same is hereby fixed and set on Tuesday, November 10th at the hour of 1:30 o'clock in the afternoon of said day in the courtroom of this court and that a copy of this order shall be served upon said George E. Lilley, as trustee aforesaid, or upon his counsel of record in said cause,

DONE in open court this 9th day of November, 1936.

DAVE W. LING
Judge

[Endorsed]: Received copy of the within this 9th day of November, 1936.

THOMAS W. NEALON
Attorney for Trustee,
George E. Lilley.

[Endorsed]: Filed Nov 9 1936. [956]

October 1936 Term — At Phoenix

MINUTE ENTRY
of November 10, 1936
(Phoenix General Minutes)
HONORABLE DAVE W. LING,
United States District Judge, Presiding.

[Title of Cause.]

HEARING ON MOTION TO VACATE ORDER SETTLING STATEMENT OF EVIDENCE.

Trustee's Motion to Vacate Order Settling, Certifying and Allowing Statement of Evidence on Appeals comes on regularly for hearing this day.

Thomas W. Nealon, Esquire, and Alice M. Birdsall, Esquire, appear as counsel for the Trustee. William H. MacKay, Esquire, appears as counsel for Respondent, Margaret B. Barringer, and John L. Gust, Esquire, appears as counsel for the Re-

spondent, Phoenix Title and Trust Company, as Trustee.

Counsel for the Trustee now object and except to hearing of said Motion at this time.

Argument is now had by respective counsel, and

IT IS ORDERED that said Motion to Vacate Order Settling, Certifying and Allowing Statement of Evidence on Appeals be submitted and by the Court taken under advisement.

Subsequently, the Court having duly considered the same and being fully advised in the premises,

IT IS ORDERED that said Motion to Vacate Order Settling, Certifying and Allowing Statement of Evidence on Appeals be, and the same is hereby denied, and that an exception be entered on behalf of the Trustee. [957]

CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT OF RECORD.

In the United States District Court
for the District of Arizona.

United States of America
District of Arizona—ss:

I, EDWARD W. SCRUGGS, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the matter of Windsor Square Development, Inc., a corporation, Bankrupt, numbered B-570 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 22, inclusive, contain a full, true and cor-

rect supplemental transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe for supplemental transcript filed in said cause and made a part of the supplemental transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said supplemental transcript of record amounts to the sum of $3.00 and that said sum has been paid to me by counsel for the appellant.

WITNESS my hand and the seal of the said Court this 18th day of December, 1936.

[Seal] EDWARD W. SCRUGGS,
Clerk.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

In the United States District Court
for the District of Arizona.

United States of America,
District of Arizona—ss.

I, EDWARD W. SCRUGGS, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the matter

of Windsor Square Development, Inc., a corporation, Bankrupt, numbered B-570 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 966, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $140.00, and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

Witness my hand and the seal of the said Court this 11th day of November, 1936.

EDWARD W. SCRUGGS,
Clerk.

[Seal] By WM. H. LOVELESS
Chief Deputy Clerk. [958]

[Title of Court and Cause.]

CITATION.

United States of America—ss.

To: GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt; SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation; CENTRAL ARIZONA LIGHT & POWER COMPANY, a corporation; COUNTY OF MARICOPA, a political subdivision of the State of Arizona; STATE OF ARIZONA; JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona; MITT SIMS, Treasurer of the State of Arizona; W. R. WELLS, RAYMOND L. NIER; J. ALLEN WELLS; E. L. GROSE and MAUDE M. GROSE, his wife; GLEN E. WEAVER; LUCILLE NICHOLS; NELLIE B. WILKINSON; SUSIE M. WALLACE; E. R. FOUTZ; THOMAS J. TUNNEY, and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation:

YOU, AND EACH OF YOU, are hereby cited and admonished to be and appear in the Circuit Court of Appeals of the United [959] States for the Ninth Circuit, at San Francisco, California, on March 7th, 1935, pursuant to an order allowing an appeal from the District Court of the United States,

in and for the District of Arizona, in the matter of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, vs. Margaret B. Barringer; Phoenix Title and Trust Company, a corporation; Salt River Valley Water Users' Association, a corporation; Central Arizona Light & Power Company, a corporation; County of Maricopa; State of Arizona; John D. Calhoun, County Treasurer of the County of Maricopa, State of Arizona; Mitt Sims, Treasurer of the State of Arizona; W. R. Wells; Raymond L. Nier; J. Allen Wells; E. L. Grose; Glen E. Weaver; E. R. Foutz; Lucille Nichols; Nellie B. Wilkinson and Susie M. Wallace, and Thomas J. Tunney (Alleged Lien-Holders), wherein Margaret B. Barringer and Phoenix Title and Trust Company, as Trustee, are appellants, and you are appellees, to show cause, if any there be, why the order or decree of the District Court, dated and entered January 7, 1935, should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Fred C. Jacobs, Judge of the District Court of the United States, in and for the District of Arizona, this 5th day of February, 1935.

[Seal] F. C. JACOBS,
District Judge. [960]

Service of a copy of the foregoing Citation, together with copies of Petition for Appeal, Assign-

ment of Errors, Bond on Appeal and Order Allowing Appeal With Supersedeas, respectively, is acknowledged this 6 day of February, 1935.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc. a corporation, Bankrupt,

By THOMAS W. NEALON
ALICE M. BIRDSALL
His Attorneys

SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation,

By LIN B. ORME
Its President

CENTRAL ARIZONA LIGHT & POWER COMPANY, a corporation,

By ARMSTRONG, KRAMER, MORRISON & ROCHE
Per ROCHE
Its Attorneys

COUNTY OF MARICOPA

By HARRY JOHNSON
County Attorney

STATE OF ARIZONA

By JOHN L. SULLIVAN
Attorney General

MIT SIMS
Treasurer of the State of Arizona
W. R. WELLS
By HAYES, STANFORD, WALTON, ALLEE & WILLIAMS
By MATT S. WALTON
His Attorneys

(Raymond L. Nier) [961]

(J. Allen Wells)
E. L. GROSE AND MAUDE M. GROSE
By CUNNINGHAM, CARSON & GIBBONS,
Their Attorneys
GLEN E. WEAVER
E. R. FOUTZ

(Lucille Nichols)
NELLIE B. WILKINSON

(Susie M. Wallace)
THOMAS J. TUNNEY
JOHN D. CALHOUN
Formerly County Treasurer of the County of Maricopa, State of Arizona
By WALLACE W. CLARK,
His Attorney

HARRY M. MOORE
County Treasurer of the County of Maricopa, State of Arizona.
WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,
By FLANIGAN & FIELDS
Its Attorneys [962]

[Title of Court and Cause.]

ACKNOWLEDGMENT OF SERVICE OF CITATION.

Service of a copy of the annexed Citation, together with copy of Petition for Appeal, Assignment of Errors, Bond on Appeal, and Order Allowing Appeal of Margaret B. Barringer and Phoenix Title and Trust Company, respectively, is acknowledged by the undersigned this 15th day of February, 1935.

SUSAN WALLACE [963]

[Title of Court and Cause.]

ACKNOWLEDGMENT OF SERVICE OF CITATION.

Service of a copy of the annexed Citation, together with copy of Petition for Appeal, Assignment of Errors, Bond on Apepal, and Order Allow-

ing Appeal of Margaret B. Barringer and Phoenix Title and Trust Company, respectively, is acknowledged by the undersigned this 5th day of February, 1935.

LUCILE NICHOLS. [964]

[Title of Court and Cause.]

ACKNOWLEDGMENT OF SERVICE OF CITATION.

Service of a copy of the annexed Citation, together with copy of Petition for Appeal, Assignment of Errors, Bond on Appeal, and Order Allowing Appeal of Margaret B. Barringer and Phoenix Title and Trust Company, respectively, is acknowledged by the undersigned this 16th day of February, 1935.

RAYMOND L. NIER. [965]

District of Arizona—ss.

I hereby certify and return, that on the 12th day of February, 1935, I received the within Citation and that after diligent search, I am unable to find the within-named defendant, J. Allen Wells, within my district.

G. A. MAUK
United States Marshal.
By J. D. WICK
Chief Deputy United States Marshal.

[Endorsed]: Filed Feb. 26, 1935. [966]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 7765

In the Matter of WINDSOR SQUARE DEVELOPMENT, INC., a corporation,

Bankrupt,

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation,

Bankrupt,

vs.

MARGARET B. BARRINGER; PHOENIX TITLE AND TRUST COMPANY, a corporation; SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation; CENTRAL ARIZONA LIGHT & POWER COMPANY, a corporation; COUNTY OF MARICOPA; STATE OF ARIZONA; JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona; MITT SIMS, Treasurer of the State of Arizona; W. R. WELLS; RAYMOND L. NIER; J. ALLEN WELLS; E. L. GROSE; GLEN E. WEAVER; E. R. FOUTZ; LUCILLE NICHOLS; NELLIE B. WILKINSON and SUSIE M. WALLACE, and THOMAS J. TUNNEY (Alleged Lien-Holders).

PETITION FOR APPEAL

To the Honorable Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Petitioners, the above named Margaret B. Barringer and Phoenix Title and Trust Company, a corporation, as Trustee, respectively, without prejudice to their right to prosecute an appeal heretofore allowed by the District Court of the United States, in and for the District of Arizona, from the order hereinafter mentioned, considering themselves aggrieved by the order or decree of said District Court of the United States, in and for the District of Arizona, made and entered on the 7th day of January, 1935, in the above entitled proceeding, in that said order or decree denied their respective petitions for review of an order of R. W. Smith, Esq., Referee in Bankruptcy, adjudging Phoenix Title and Trust Company, as Trustee, to have no right, title or interest in or to the property described in said Referee's order, and adjudging and decreeing that appellant Margaret B. Barringer has no lien thereon, as provided in a certain declaration of trust executed by Phoenix Title and Trust Company, as Trustee; and in that said order or decree approved and affirmed the findings and conclusions of said Referee; and in that said order or decree ordered George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, to sell said property owned by appellant Phoenix Title and Trust Company as Trustee, and held by it pursuant to a certain declaration of trust to secure the indebtedness of one Thomas J. Tunney to ap-

pellant Margaret B. Barringer, free from the provisions of said declaration of trust and free from appellant Margaret B. Barringer's lien thereunder; and in that said order or decree adjudged that appellant Margaret B. Barringer is not entitled to have her lien upon said property transferred to the proceeds of such sale, do hereby, jointly and severally, pray for an order allowing an appeal from the order of said District Court made and entered on January 7, 1935, for the foregoing reasons and for the reasons specified in the assignment of errors, which is filed herewith.

Dated: February 5, 1935.

MARGARET B. BARRINGER
By WM. H. MacKAY
PHOENIX TITLE AND TRUST COMPANY, as Trustee,
By WM. H. MacKAY
Petitioners.

ELLINWOOD & ROSS
By WM. H. MacKAY
Attorneys for Petitioner Margaret B. Barringer

KIBBEY, BENNETT, GUST, SMITH & ROSENFELD
By JOHN L. GUST
Attorneys for Petitioner Phoenix Title and Trust Company, as Trustee.

[Endorsed]: Filed Feb. 5, 1935. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now Margaret B. Barringer and Phoenix Title and Trust Company, a corporation, as Trustee, and file the following assignment of errors upon which they will rely upon their appeal from the order and decree made by the District Court of the United States, in and for the District of Arizona, on the 7th day of January, 1935, in the above entitled matter, and said Margaret B. Barringer and Phoenix Title and Trust Company, as Trustee, appellants herein, state that said order is erroneous and against their just rights for the following reasons:

I.

The District Court erred in denying, by its said order of decree of January 7, 1935, the petition of review of the order of R. W. Smith, Esq., Referee in Bankruptcy, made on September 17, 1932, entitled, "Order and Decree Fixing and Marshalling Liens, Determining Priority Thereof and Adjudging Certain Asserted Liens and Interests Null and Void," in the above entitled proceeding.

II.

The District Court erred by its said order or decree of January 7, 1935, in approving and affirming the order of R. W. Smith, Esq., Referee in Bankruptcy, made on September 17, 1932, in the above entitled proceeding.

III.

The District Court erred in its order approving and affirming the Referee's said order in that said Referee erroneously failed to find, as manifestly shown by the reporter's transcript of the evidence before said Referee and certified to said District Court on review, that appellant Phoenix Title and Trust Company, as Trustee, is the lawful owner of the property described in the Referee's said order, and holds the said property as security for the indebtedness of one Thomas J. Tunney to appellant Margaret B. Barringer.

IV.

The District Court erred in its order approving and affirming the Referee's said order in that said Referee erroneously found from the evidence that appellant Margaret B. Barringer in January, 1929, sold said property to Messrs. Owens, Dinmore and Mills, and that they paid to her the agreed consideration therefor, whereas the evidence, as shown by said reporter's transcript, clearly shows that appellant Margaret B. Barringer never sold said property to Messrs. Owens, Dinmore and Mills, and on the contrary conveyed it by duly recorded warranty deed to appellant Phoenix Title and Trust Company, as Trustee, to hold said property for the paramount purpose of securing the said indebtedness of Thomas J. Tunney, who, in a declaration of trust, likewise expressly agreed that the whole of said property should always be held for the purpose aforesaid.

V.

The District Court erred in approving and affirming the Referee's said order in that the Referee in said order erroneously found and held that the said ownership and title of appellant Phoenix Title and Trust Company, as Trustee, is void as to the Trustee in Bankruptcy and the creditors of the bankrupt for the insufficient reason that a certain declaration of trust, in which it agreed to hold said property and title thereto as security for said indebtedness of Thomas J. Tunney, was not recorded.

VI.

The District Court erred in approving and affirming the Referee's said order in that the Referee in said order erroneously found and held that the agreement of said appellant Phoenix Title and Trust Company, as Trustee, and of said Thomas J. Tunney in said declaration of trust contained to the effect that said property and title thereto shall be held as security for the said indebtedness of Thomas J. Tunney is void as to the Trustee in Bankruptcy and the bankrupt's creditors for the insufficient reason that said declaration of trust was not recorded.

VII.

The District Court erred in approving and affirming the Referee's said order in that the Referee in said order erroneously found and held that the bankrupt, as assignee of said Thomas J. Tunney by mesne assignments, succeeded to an interest in and to said property, whereas under the laws of the

State of Arizona neither Thomas J. Tunney nor any of his assignees acquired any interest, equitable or otherwise, in said property under the provisions of said declaration of trust.

VIII.

The District Court erred in approving and affirming the Referee's said order in that the Referee in said order further erroneously found and held that any interest in said property claimed by the Trustee in Bankruptcy is free from the agreements of appellant Phoenix Title and Trust Company, as Trustee, and Thomas J. Tunney, the bankrupt's assignor in said declaration of trust contained, to the effect that the entire title, interest and estate in and to said property shall secure the indebtedness of Thomas J. Tunney, for the insufficient reason that said declaration of trust was not recorded.

IX.

The District Court erred in approving and affirming the Referee's said order in that the Referee in said order erroneously found and held that appellant Margaret B. Barringer could not enforce the provisions of said declaration of trust as against Thomas J. Tunney's assignee, the bankrupt, for the insufficient reason that said declaration of trust was not recorded.

X.

The District Court erred in approving and affirming the Referee's said order in that the Referee in said order, contrary to the laws of the State of Arizona, erroneously seeks to prevent appellant Phoe-

nix Title and Trust Company, as Trustee, from performing its duty under said declaration of trust to hold said property as security for said indebtedness of Thomas J. Tunney.

XI.

The District Court erred in approving and affirming the findings of fact of said Referee, because the finding of the Referee to the effect that prior to the filing of the petition of bankruptcy herein and at the time of filing thereof, on October 25, 1930, all of the property described in said Referee's order of September 17, 1932, was in the possession of said bankrupt, is erroneous in that the evidence as set forth in the transcript of evidence, pursuant to the order of said District Court, used at the hearing before the District Court on appellant Margaret B. Barringer's petition for review, shows that said bankrupt was never in possession of said property.

XII.

The District Court erred in approving and affirming the findings of fact of said Referee, because the finding of the Referee to the effect that George E. Lilley, Trustee in Bankruptcy of the above entitled bankrupt estate, immediately, upon qualifying as such Trustee, took possession of said property, and ever since has had possession thereof, is erroneous in that the evidence manifestly shows that said property is, and ever since December, 1928, has been, in the possession of appellant Phoenix Title and Trust Company, as Trustee, the lawful owner of record thereof.

XIII.

The District Court erred in approving and affirming the findings of fact of said Referee, because the finding of the Referee to the effect that Messrs. Owens, Dinmore and Mills, on the consummation of said transaction, went into possession of said property and improved the same, is erroneous, in that the evidence manifestly shows that said Messrs. Owens, Dinmore and Mills never were in possession of said property, and that said property is and always has been vacant and unimproved, and that any and all improvements installed or paid for by said Messrs. Owens, Dinmore and Mills consisted of trees, paving, curbs, lights, sewers and other street improvements, none of which were ever installed on any of the property described in said Referee's order of September 17, 1932.

XIV.

The District Court erred in approving and affirming the findings of fact of said Referee for the reason that the finding of said Referee to the effect that appellants Margaret B. Barringer and Phoenix Title and Trust Company as Trustee permitted the bankrupt to exercise dominion over, retain possession of and hold itself out to the public in general and numerous creditors in particular as the owner of the property described in said Referee's order of September 17, 1932, and that in reliance thereon, credit was extended to the bankrupt by creditors of said bankrupt, is erroneous in that said finding was without support in the evidence before the Referee and is contrary to the evidence.

XV.

The District Court erred in approving and affirming the findings of fact of said Referee for the reason that the finding of said Referee to the effect that appellants Margaret B. Barringer and Phoenix Title and Trust Company as Trustee permitted the bankrupt's predecessors to exercise dominion over, retain possession of and hold themselves out to the public in general and numerous creditors in particular as the owners of the property described in said Referee's order of September 17, 1932, and that in reliance thereon, credit was extended to the bankrupt's predecessors by creditors of said bankrupt, is erroneous in that said finding was without support in the evidence before the Referee and is contrary to the evidence.

XVI.

The District Court erred in approving and affirming the Referee's order of September 17, 1932, in that said Referee, by his said order, held and found that said declaration of trust was invalid because it was not recorded, whereas under the laws of the State of Arizona the provisions of said declaration of trust, though unrecorded, are valid and binding as to said Trustee of said bankrupt and the said bankrupt's creditors.

XVII.

The District Court erred in approving and affirming said Referee's order of September 17, 1932, in that it conclusively appears from the evidence that the transfer by Messrs. Owens, Dinmore and Mills

of their rights under said declaration of trust to the bankrupt and the assumption by the bankrupt of their indebtedness were and are, respectively, fraudulent, fictitious and void under the laws of the State of Arizona, and that said order of the Referee and the entire proceedings before the Referee in said bankruptcy estate are fraudulent and void.

XVIII.

The District Court erred in approving and affirming the Referee's said order in that, over appellants' objections, said Referee permitted witnesses E. L. Grose, Forest Whitney and Henry F. Lieber, respectively, to testify that they believed the property in question to be owned by said Messrs. Owens, Dinmore and Mills, in that the evidence shows no valid grounds existed for their respective beliefs.

XIX.

The District Court erred in approving and affirming the Referee's said order in that said Referee denied to appellant Margaret B. Barringer the right to cross-examine witnesses W. R. Wells and Henry F. Lieber concerning their beliefs as to the ownership of said property and outstanding liens thereon, the testimony of said witnesses concerning said matters having been, as shown by said Referee's summary and said reporter's transcript, certified to said District Court on review.

Wherefore, your petitioners pray that the court allow an appeal herein from the order or decree of

January 7, 1935, and fix the amount and approve a bond for cost on said appeal.

Dated: February 5, 1935.

ELLINWOOD & ROSS
By WM. H. MacKAY
Attorneys for Petitioner Margaret B. Barringer

KIBBEY, BENNETT, GUST, SMITH AND ROSENFELD
By JOHN L. GUST
Attorneys for Petitioner Phoenix Title and Trust Company, as Trustee.

[Endorsed]: Filed Feb. 5, 1935. Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1935 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-first day of October in the year of our Lord One Thousand Nine Hundred and Thirty-five.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable FRANCIS A. GARRECHT, Circuit Judge; Honorable BERT E. HANEY, Circuit Judge.

[Title of Cause.]

ORDER ALLOWING APPEAL.

Upon consideration of the petition of Margaret B. Barringer, et al., filed February 5, 1935, for allow-

ance of appeal, and of the assignment of errors thereon, filed on said date, and good cause therefor appearing,

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the District Court of the United States for the District of Arizona, entered on January 7, 1935, be, and the same hereby is allowed.

The bond heretofore given in this cause on the appeal allowed by the said District Court of Arizona shall stand as the bond on appeal herein.

[Title of Court and Cause.]

CITATION.

UNITED STATES OF AMERICA—ss.

TO: GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt; SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation; CENTRAL ARIZONA LIGHT & POWER COMPANY, a corporation; COUNTY OF MARICOPA, a political subdivision of the State of Arizona; STATE OF ARIZONA; JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona; MITT SIMS, Treasurer of the State of Arizona; W. R. WELLS; RAYMOND L. NIER; J. ALLEN WELLS; E. L. GROSE and MAUDE M. GROSE, his wife;

GLEN E. WEAVER; LUCILLE NICHOLS; NELLIE B. WILKINSON; SUSIE M. WALLACE; E. R. FOUTZ; THOMAS J. TUNNEY, and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation:

You, and each of you, are hereby cited and admonished to be and appear in the Circuit Court of Appeals of the United States, for the Ninth Circuit, at San Francisco, California, on November 21, 1935, pursuant to an order allowing an appeal from the District Court of the United States, in and for the District of Arizona, in the matter of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, vs. Margaret B. Barringer; Phoenix Title and Trust Company, a corporation; Salt River Valley Water Users' Association, a corporation; Central Arizona Light & Power Company, a corporation; County of Maricopa; State of Arizona; John D. Calhoun, County Treasurer of the County of Maricopa, State of Arizona; Mitt Sims, Treasurer of the State of Arizona; W. R. Wells; Raymond L. Nier; J. Allen Wells; E. L. Grose; Glen E. Weaver; E. R. Foutz; Lucille Nichols; Nellie B. Wilkinson and Susie M. Wallace, and Thomas J. Tunney (Alleged Lien-Holders), wherein Margaret B. Barringer and Phoenix Title and Trust Company, as Trustee, are appellants, and you are appellees, to show cause if any there be, why

the order or decree of the District Court, dated and entered January 7, 1935, should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable CURTIS D. WILBUR, Judge of the United States Circuit Court of Appeals, for the Ninth Circuit, this 21st day of October, 1935.

CURTIS D. WILBUR
U. S. Circuit Judge.

[Title of Court and Cause.]

ACKNOWLEDGMENT OF SERVICE OF CITATION ON APPEAL.

Service of Citation on Appeal is acknowledged by each of the undersigned this 24th day of October, 1935.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, Bankrupt,
By THOMAS W. NEALON
ALICE M. BIRDSALL
His Attorneys

SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation,
By LIN B. ORME
Its President

CENTRAL ARIZONA LIGHT &
POWER COMPANY,
a corporation,
By ARMSTRONG, KRAMER,
M. & R.,
THOS. ARMSTRONG, JR.
Its Attorneys

COUNTY OF MARICOPA
By HARRY JOHNSON
County Attorney

STATE OF ARIZONA
By JOHN L. SULLIVAN
Attorney General

MIT SIMMS
Treasurer of the State of
Arizona
W. R. WELLS
By HAYES, STANFORD
WALTON, ALLEE &
WILLIAMS
By MATT S. WALTON
His Attorneys

RAYMOND L. NIER

.....

(J. Allen Wells)

E. L. GROSE and
MAUDE M. GROSE
By CUNNINGHAM, CARSON &
GIBBONS
Their Attorneys

.....

(Glen E. Weaver)

E. R. FOUTZ
LUCILLE NICHOLS
H. B. WILKINSON
For Nellie B. Wilkinson
SUSIE M. WALLACE
THOMAS J. TUNNEY
JOHN D. CALHOUN
Formerly County Treasurer of the County of Maricopa, State of Arizona
HARRY M. MOORE
County Treasurer of the County of Maricopa, State of Arizona
WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,
By FLANIGAN & FIELDS
Its Attorneys

[Endorsed]: Filed Nov. 23, 1935. Paul P. O'Brien, Clerk.

In the District Court of the United States in and for the District of Arizona.

[Title of Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, Margaret B. Barringer and Phoenix Title and Trust Company, a corporation, as principal, and Hartford Accident and Indemnity Com-

pany, a corporation of the State of Connecticut, as surety, are held and firmly bound unto George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt; Salt River Valley Water Users' Association, a corporation; Central Arizona Light & Power Company, a corporation; County of Maricopa, a political subdivision of the State of Arizona; State of Arizona; John D. Calhoun, County Treasurer of the County of Maricopa, State of Arizona; Mitt Sims, Treasurer of the State of Arizona; W. R. Wells; Raymond L. Nier; J. Allen Wells; E. L. Grose and Maude M. Grose, his wife; Glen E. Weaver; Lucille Nichols; Nellie B. Wilkinson; Susie M. Wallace; E. R. Foutz; Thomas J. Tunney, and Windsor Square Development, Inc., the bankrupt corporation, in the full sum of five thousand dollars ($5,000), for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 4th day of February, 1935.

Whereas an order was entered in the above entitled proceeding in the District Court of the United States, in and for the District of Arizona, on the 5th day of February, 1935, allowing an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from a certain order or decree made and entered by said District Court of the United States, in and for the District of Arizona, on the 7th day of January, 1935, approving and affirming

that certain order of R. W. Smith, Esq., Referee in Bankruptcy, fixing and marshalling liens, etc., made on September 17, 1932; and

Whereas in said order allowing said appeal it was ordered, adjudged and decreed that said appeal shall operate as a supersedeas on execution by said Margaret B. Barringer and Phoenix Title and Trust Company of a bond in the sum of $5,000, conditioned as required by law;

Now, Therefore, the condition of the above obligation is such that if the said Margaret B. Barringer and Phoenix Title and Trust Company shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good their pleas, then the above obligation to be void, else to remain in full force and virtue.

In Witness Whereof, the undersigned have executed this bond this 4th day of February, 1935.

MARGARET B. BARRINGER
PHOENIX TITLE AND TRUST COMPANY,
By GEO. W. MICKLE
Its President

Attest:

L. J. TAYLOR
Its Secretary
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
By V. M. HALDIMAN
Its Attorney in Fact.

I hereby approve the foregoing bond.

Dated this 5th day of February, 1935.

F. C. JACOBS
Judge.

State of Arizona,
County of Maricopa—ss.

On this 4th day of February, 1935, before me, Lucille Hill, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Margaret B. Barringer, known to me to be one of the persons who subscribed her name to the foregoing instrument, and acknowledged to me that she executed the same for the purpose and consideration therein expressed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the county and state aforesaid the day and year in this certificate first above written.

LUCILLE HILL
Notary Public in and for Maricopa County, State of Arizona.

My commission expires: 3/17/37.

State of Arizona,
County of Maricopa—ss.

On this 4th day of February, 1935, before me, Albert L. Clark, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Geo. W. Mickle and L. J. Taylor, known to me to be the

President and Secretary, respectively, of Phoenix Title and Trust Company, a corporation, and acknowledged to me that they executed the foregoing instrument for and on behalf of said corporation as such President and Secretary, respectively, for the purpose and consideration therein expressed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the county and state aforesaid the day and year in this certificate first above written.

ALBERT L. CLARK

Notary Public in and for Maricopa County, State of Arizona.

My commission expires: May 23, 1937.

State of Arizona,
County of Maricopa—ss.

On this 4th day of February, 1935, before me, Ruth Riggs, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared V. M. Haldiman, known to me to be the duly authorized Attorney in Fact of Hartford Accident and Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney in Fact of said company, and that the said V. M. Haldiman duly acknowledged to me that he subscribed the name of Hartford Accident and Indemnity Company thereto as surety, and his own name as Attorney in Fact, and that he executed the foregoing instrument as such Attorney in Fact for the said Hartford Acci-

dent and Indemnity Company for the purpose and consideration therein expressed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the county and State aforesaid, the day and year in this certificate first above written.

RUTH RIGGS

Notary Public in and for Maricopa County, State of Arizona.

My commission expires: June 9, 1938.

In the United States Circuit Court of Appeals
For the Ninth Circuit.

[Title of Cause.]

STATEMENT OF ERRORS INTENDED TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED.

Come now Margaret B. Barringer and Phoenix Title and Trust Company, a corporation, as Trustee, the appellants in the above entitled cause, and adopt their assignments of error as their statement of errors to be relied upon;

And said appellants state that only the following parts of the record, as filed in this court, are deemed necessary to be printed for the consideration of the errors above referred to, viz:

together with all original appeal papers filed in and orders made and entered by the above entitled court.

(Note: The above parts of the record marked with an asterisk (*) also appear verbatim in the Statement of Evidence at the respective pages in parentheses set forth after the title of each paper. It is, therefore, suggested that the Clerk print only the titles of such papers, together with an indication that the same are printed in full as a part of the Statement of Evidence at the respective pages at which the same are so printed.)

Dated: November 23, 1936.

ELLINWOOD & ROSS
WM. H. MACKAY
KIBBEY, BENNETT, GUST,
SMITH & ROSENFELD
JOHN L. GUST
Attorneys for Appellants.

[Endorsed]: Filed Nov. 23, 1936. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

STATEMENT OF GEORGE E. LILLEY, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF WINDSOR SQUARE DEVELOPMENT, INC., A CORPORATION, APPELLEE, OF PARTS OF RECORD NECESSARY FOR CONSIDERATION OF APPEAL. (Sec. 8 of Rule 23.)

To the Honorable Paul P. O'Brien, Clerk of the Circuit Court of Appeals for the Ninth Circuit.

Appellee George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Develop-

ment, Inc., a corporation, hereby designates in writing, parts of the record in addition to those asked for by the appellants, which he deems material; such parts not designated by the appellants but which are hereby designated by said appellee, being as follows:

	Document	Page of Original Certified Record
1.	Adjudication and Order of Reference	5
2.	Amended Answer of Phoenix Title & Trust Company to Order to Show Cause	129
3.	Answer of County of Maricopa and John D. Calhoun Treasurer thereof	53
4.	Answer of Margaret B. Barringer to Trustee's Petition to Marshal Liens and Sell, and Petition in Intervention	83
5.	Answer of W. R. Wells	62
6.	Answer of Raymond L. Nier	64
7.	Answer of J. Allen Wells	66
8.	Answer of Salt River Valley Water Users' Association	67
9.	Appearance of E. L. Grose in Conformity with Trustee's (Referee's) Order	77
10.	Certificate of Review on Petition of Margaret B. Barringer	289
11.	Certificate of Review on Petition of Phoenix Title and Trust Company	292
12.	Citation on Appeal, dated February 5, 1935, together with acknowledgments of service and marshal's return thereof, filed with the Clerk February 26, 1935	958

Document	Page of Original Certified Record
42. Return of Service of Order to Show Cause on Petition to Sell Free and Clear of Encumbrances	24-43
43. All Minute Entries in Office of Clerk of the District Court in this proceeding	
44. This instrument.	

In Appellant's statement and designation of parts of the record to be printed, they have incorporated a note reading as follows:

> "(Note: The above parts of the record marked with an asterisk (*) also appear verbatim in the Statement of Evidence at the respective pages in parentheses set forth after the title of each paper. It is, therefore, suggested that the Clerk print only the titles of such papers, together with an indication that the same are printed in full as a part of the Statement of Evidence at the respective pages at which the same are so printed.)

To this procedure this Appellee does not consent, and certain portions of the record marked with an asterisk in appellants' designation hereinabove referred to, are designated by this appellee as necessary portions of the record to be printed independent of the Statement of Evidence. This Appellee cannot therefore accept the suggestions contained in said "Note".

As a reason for refusing to accept such suggestion this Appellee points out that the purported

Statement of Evidence incorporated in the record was not prepared and settled in accordance with Equity Rule 75, nor in accordance with the rules of the Circuit Court of Appeals for the Ninth Circuit; nor was any notice given to this Appellee of the time when such Statement of Evidence would be presented to the Judge for settlement, and counsel for this Appellee were not present when the same was settled. Furthermore said Statement of Evidence was not settled by the Judge who tried the case and who was at all times from the date of the lodging of said Statement of Evidence in the Federal District of Arizona and available at all times for the purpose of settling said Statement of Evidence, and who was not disqualified in any manner from doing so and was at all times ready, able and willing to settle such Statement of Evidence whenever the same should be presented to him in accordance with the rules of court governing such matters.

Dated this 1st day of December, 1936.

ALICE M. BIRDSALL
THOMAS W. NEALON
Attorneys for Appellee George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation.

Received copy of Statement of George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, Appellee,

of Parts of Record Necessary for Consideration of Appeal, this 1st day of December, 1936.

ELLINWOOD & ROSS
N. H. MacKAY
Attorneys for Margaret B. Barringer
KIBBEY, BENNETT, GUST, SMITH & ROSENFELD
J. L. GUST
Attorneys for Appellants.

[Endorsed]: Filed Dec. 2, 1936. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER RESPECTING PRINTING OF RECORD.

It having been brought to the attention of the court that certain papers and documents, which are a part of the transcript of record on file herein, are set forth in full in the statement of evidence, which is also a part of said transcript of record; and it appearing that needless duplication of printing will occur if said papers and documents are printed in full in both places in the record;

It is therefore ORDERED that, where such papers and documents appear in the record other than in the statement of evidence, the clerk shall cause to be printed only the name and designation of each such paper or document, together with a statement that such paper or document is set forth

in full in the statement of evidence and a reference to the page or pages of the printed transcript of record where such paper or document is so set forth. Upon so printing the names and designations of such papers or documents with such statements and references, such papers and documents shall be considered as if printed in full at the places where their respective names and designations appear in the printed record.

It is further ORDERED that this order be printed with the transcript of record.

Dated: December 21, 1936.

CURTIS D. WILBUR
United States Circuit Judge

[Endorsed]: Filed Dec. 21, 1936. Paul P. O'Brien, Clerk.

[Endorsed]: No. 7765. United States Circuit Court of Appeals for the Ninth Circuit. Margaret B. Barringer and Phoenix Title and Trust Company, as Trustee, Appellant, vs. George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, Salt River Valley Water Users' Association, a corporation, Central Arizona Light and Power Company, a corporation, County of Maricopa, a political subdivision of the State of Arizona, State of Arizona, John D. Calhoun, County Treasurer of the County of Maricopa, State of Arizona, Mitt Sims, Treasurer of the State of Arizona, W. R. Wells, Raymond L. Nier, J. Allen Wells, E. L. Grose and Maude M. Grose, his wife, Glen E. Weaver, Lucille Nichols, Nellie B. Wilkinson, Susie M. Wallace, E. R. Foutz, Thomas J. Tunney, and Windsor Square Development, Inc., the bankrupt corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed: November 13, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.